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Private Military Companies: Their Role in the Continuum of Conflict

by

Mark Minenko

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws

Faculty of Law

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03 October 2003

Abstract

Changes in global security issues have resulted in increasing amounts of intrastate conflict. Alleviating the human suffering which these conflicts bring requires quick reaction which the United Nations preventive process has not been able to meet. A review of the record of various UN peacekeeping and regional rapid reaction forces indicates that not only have these alternatives not relieved human suffering, but that these forces have negatively contributed to the conflict they are meant to resolve. This thesis argues that there are no stated legal impediments to the introduction of Private Military Companies into the continuum of conflict. The thesis also looks at a number of issues related to the UN Secretary-General and his ability to interpret his role and concludes that the Secretary-General of the UN has sufficient authority to outsource the immediate reaction to conflict and hire Private Military Companies.

University of Alberta

Faculty of Graduate Studies and Research

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled Private Military Companies: ~~A~~ Their Role in the Continuum of Conflict ~~Legal Alternative to United Nations Peacekeeping~~ submitted by Mark Minenko in partial fulfillment of the requirement for the degree of Master of Laws.

Gerald L. Gall, O.C.

W. Andy Knight

Trevor Farrow

02 OCTOBER 2003

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INTRODUCTION

The end of the Cold War seemingly settled the argument between capitalism and communism and yet unleashed a stream of unexpected cruelty and savagery which many nations had not expected. Much of this brutality is as a result of intra-state conflict where civilians, aid-workers and peacekeepers have not only been caught between warring criminal factions and thugs, but have often been their primary target. Rarely do armies of recognized parties appear on the battlefield with clear and understandable objectives based in nationalism or self-determination. Rarely are the participants in this violence directed by a leadership not only familiar with *jus ad bellum* and *jus in bello* but which is prepared to follow these generally accepted rules of conflict.

Rising against this current is the Western nations' desire to secure for themselves the long anticipated Cold War's peace dividend of reduced military spending. This factor along with the reduced interest in areas with little strategic interest has led to the result that Western nations are less involved in United Nations peacekeeping missions than before the end of the Cold War. Until the end of the Cold War, the West significantly contributed personnel and materiel to these missions. These forces have largely been replaced by an assortment of ill-equipped, poorly supported and questionably lead soldiers from developing nations. The result has been and continues to be increasing peacekeeping expenses with questionable efficacy.

Even when Western nations have chosen to become involved via a host of rapid reaction forces their success has been limited and effectiveness questioned.

The net result of the last decade has been increased suffering by those being used as pawns by one thug or another. Trials are not enough. What is necessary is a force which will apply an effective level of coercive capacity at the beginning of a cycle of violence to prevent the immediate suffering of the innocents. This would then allow the UN the opportunity to work through its geo-political issues to arrive at an effective long-term solution to the conflict.

The thesis is that this coercive force can be provided to the UN through the outsourcing of this capacity to the Private Military Company (PMC). Over the last decade this industry has developed and refined its services to the point that they already provide a full range of services to various governments, militaries, non-governmental organizations and international organizations. If it is logistics one requires, a PMC will provide that service. If bodyguards are needed for a government or corporation, a PMC will provide that services. If you need a stabilizing force to prevent a humanitarian disaster from either developing or escalating, a PMC or group of PMCs will provide that service. If the UN requires a vehicle by which state contributions can be directed at Kofi Annan's usage of the phrase culture of prevention as opposed to funnelling taxes from western state treasuries into the hands of developing nation militaries, PMCs have proven that they are an efficient and effective means of filling the need to ensure the continued relevancy of the UN.

The thesis recognizes that to be able to react effectively to situations, a significantly more streamlined process at the UN needs to be put in place. With so few matters remaining essentially within domestic jurisdiction and with the increasing role of the Secretary-General, the thesis will argue that the law and the processes are in place

for the UN Secretary-General to outsource preventive deployment functions to PMCs without Security Council direction.

The thesis is divided into five parts. Part 1 discusses the historical use of mercenaries focusing on three periods and provides several comparisons to today's situation. Private Military Companies (PMCs) will be defined and a brief discussion of their evolution follows. Part 2 reviews the international law on the subject of mercenaries and intervention by first reviewing the international treaties relating to mercenaries, considers obligation and intervention, and reviews the domestic jurisdiction element of Article 2(7) of the UN Charter and its applicability to intervention. Part 3 discusses the legal basis for peacekeeping, reviews the history of peacekeeping through the various stages of development and examines the efficacy of regional and rapid reaction force alternatives to UN lead peacekeeping. Part 4 answers the question – why PMCs should be used for peacekeeping by examining several of the arguments typically used against this proposition. In Part 5, the role of the Secretary-General is considered with the conclusion that his hiring of PMCs would be another example of the expansion of Secretary-General's role as an organ of the UN. A suggestion is also developed as to how this presently controversial objective might be shepherded through the UN.

PART 1 – THE HISTORY, DEFINITION AND EVOLUTION OF PRIVATE MILITARY COMPANIES

1.1 – The History of Mercenaries

Introduction

Condottieri[1], *lu-sung i-yung*[2], *troupes étrangères*[3], or *dogs of war*[4]. Different times, different places, different cultures – one common denominator – war and money.

Since Ancient Greece,[5] mercenaries have flourished for many reasons and in many places around the world. Mercenaries gained their notoriety and negative reputations during the 1960's and 1970's primarily in Africa. During this post-colonialist period, Africa served as the "proxy zone of superpower rivalry and Cold War arms proliferation".[6] Despite the seeming concentration of recent mercenary activity in Africa, upon closer examination we find that there is significant information about the use of mercenaries on most continents including, North America.[7]

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[1] William Caferro, *Mercenary Companies and the Decline of Siena* (Baltimore, Md.: The Johns Hopkins University Press, 1998) at xv [Caferro].

[2] Richard J. Smith, *Mercenaries and Mandarins: The Ever-Victorious Army in Nineteenth Century China* (Millwood, N.Y.: kto press, 1978) at 31 [Smith].

[3] Guy C. Dempsey, Jr., *Napoleon's Mercenaries: Foreign Units in the French Army under the Consulate and Empire, 1799-1814* (London: Greenhill Books, 2002) at 13 [Dempsey].

[4] Gerry S. Thomas, *Mercenary Troops in Modern Africa* (Boulder, Colo.: Westview Books, 1984) at xi [Thomas].

[5] G.T. Griffith, *The Mercenaries of the Hellenistic World* (Chicago: Ares Publishers Inc., 1975) [Griffith]. Reports indicate that in approximately 335 B.C. Alexander crossed the Hellespont with an army of 34,500 soldiers of whom 11,900 were Greek, Thracic Odrysian, Triballian, Illyrian, Cretan, and Agrianian mercenaries. *Ibid.* at 12-13. Professor Griffith concludes that the Peloponnesian War not only created a demand for mercenaries but, also created the supply. *Ibid.* at 4. During Alexander's Indian campaign it is estimated that more than one-half of his 120,000-man army were mercenaries (65,000). *Ibid.* at 20-21. The reason for such a high number was that after 331 B.C., the only army in the eastern Mediterranean in which Greek mercenaries could find employment was Alexander's as the other employers (Persia, Egypt and Greek cities) had been "removed from the field." *Ibid.* at 21.

[6] Abdel-Fatau Musah & J. Kayode Fayemi, eds., *Mercenaries: An African Security Dilemma*, (London: Pluto Press, 2000) at 17 [Musah].

[7] Sterling Seagrave, *Soldiers of Fortune* (Alexandria,Va: Time-Life Books Inc., 1981). This monograph details the use of American and French mercenary pilots flying for both sides of the Mexican civil war between 1911 and 1914. There is one account of the Mexican rebels paying an American pilot $300 per month plus $50 for each reconnaissance and $250 for each bombing flight. *Ibid.* at 21.

Of the many historical examples of the use of mercenaries, three distinct usages of mercenaries in three distinct historical periods will be examined for characteristics applicable to today's PMCs. The three periods to be reviewed include fourteenth century Italy, Napoleonic France and China during the 1860s. This section is not intended to give the reader a comprehensive review of the history of mercenaries but serves as a review of three distinctly different periods of history on two different continents with a view towards drawing comparisons with today.

During the fourteenth century, Italy was dominated by large organized companies of mercenaries. These companies were hired and re-hired by city-states for the purposes of defending themselves and, more importantly, to prevent another city-state from hiring those same mercenary companies to be used against them. The city-states did not control how the mercenary company carried out their contracts of employment as they had little to enforce their contracts due to ineffective and/or small citizen armies.

Despite the increased development of substantial citizen armies by nations in the late eighteenth century Napoleonic France hired mercenaries from various nations. Napoleon employed them in units based upon or entirely of mercenaries of one nationality and exercised a significant degree of control over their use[8]. These organized and specially uniformed units were used in inter-state warfare.

Our third example, China in the middle of the nineteenth century, finds us in a period of civil war and revolution. Due to the shortcomings of citizen armies, the

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[8] In many ways the Hellenistic rulers also maintained unit groupings by nationality, especially the Cretans who were known as archers. Griffith, *supra* note 5 at 251. Other nationalities which provided mercenaries to various rulers included Arabs, Mysians, Scythians, Jews Gauls, Carthagians, and various nations of northern Africa. *Ibid.*

situation had deteriorated to such a degree that in order to protect their resources from rebel forces, provincial leaders hired foreigners to provide the leadership of what were primarily private Chinese armies. These armies were paid for from local export revenues and their actions were generally controlled by local Chinese leaders with little input from the central government.

Fourteenth Century Italy

Between fighting in the battles of the Hundred Years' War, or the battles between the Peters of Aragon and Castille, many professional soldiers, knights or adventurers found Italy a favourite territory to band together into mercenary companies and plunder and/or extort money from local governments.

Italy was wealthy and suffered from contentious local politics as a result of being composed of a series of kingdoms or states often in competition with one another.[9]

In fourteenth century Florence, mercenaries were hired to provide a measure of damage control, in the sense that it was more beneficial to have mercenaries raid your neighbours and extract ransoms from them than to allow your neighbours to do the same to you.[10]

By this time in their evolution, the mercenary companies were large autonomous units known collectively as "Companies of Adventure." They were under the command of an elected captain (*condottiere*) one of whom, an Englishman (John Hawkwood) inspired Italians to refer to him as a *diavolo incarnate* or devil incarnate.[11]

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[9] Caferro, *supra* note 1 at xiv.
[10] *Ibid.* at 174.
[11] *Ibid.*

After completing his study of the impact of mercenary companies upon Siena, Italy, William Caferro concluded that "…the raids posed a grave threat to the well-being of the commune and ultimately played a key role in the decline of the city, …[and its] subjugation to … Milan."[12]

Private mercenary companies had played much the same role during the period of the Hundred Years' War and were to do the same during Thirty Years' War, in the early seventeenth century.[13] They would first promote social and political dislocation and tension as a result of their pillaging and looting of the countryside and then they would approach a town and demanded a *Brandschatzung* or contribution. Upon receiving a contribution, they would leave and go onto the next locale.[14]

In his study of Siena, Caferro, concludes that a significant reason for Siena's decline from a centre with some of Italy's leading merchants, bankers, and artists in the early fourteenth century to relative insignificance less than one hundred years later was its suffering at the hands of the *condottieri.* Siena was a target for the *condottieri* as it found itself between two frequent *condottieri* employers – Florence and the Papacy and endured 37 raids by *condottieri* between1342 and 1399[15].

The *condottiere* were of many origins – Catalan, Bavarian, German, Hungarian, French, Provençal, Flemish, Brabantine, and English.[16] These men were often from the lower nobility of various lands, members from various Holy Land crusade orders such

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[12] *Ibid.*
[13] *Ibid.* note 1 at xv.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.* at 2-4.

as the Hospitallers or Knights Templar and even from England's Knights of the Garter (Robert Knowles).[17]

These mercenary companies were organized along corporate lines and were largely based upon the model of the first of the companies – The Great Company.[18] The Great Company resembled a corporation of 3,000 cavalrymen with a defined hierarchy under the *condottiere*. The *condottiere* was elected and decisions were made by the consent of the *condottiere* and a council made up of leaders of the various contingents. The booty was carefully divided amongst the rank and file. Priests were hired to tend to the members spiritual needs. Lawyers and notaries – to deal with legal issues and to draw up contracts (*condotte*). To deal with its income – bankers were retained, while prostitutes were hired to tend to other needs.[19]

The breadth of mercenary successes during this time laid bare the ineffectiveness of national or communal armies. On the rare occasion that a native force was led to victory over the mercenaries, the leaders were never again allowed to be a war captain or they were censured for recklessness.[20] Even when individual states formed leagues or *taglia guelfa* to protect themselves from the mercenaries, they did not last long and as Caferro states, "were ultimately doomed to fail."[21] The reason for this was that the coordinated military action, which these leagues promised, required political objectives and consensus on these objectives was rare.

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[17] *Ibid.* at 5.
[18] *Ibid.* at 4
[19] *Ibid.*
[20] *Ibid.* at 101-102. The one battle where the Sienese defeated a mercenary company (Company of the Hat), the Sienese leader was knighted first and then never allowed to hold the position of war captain as he disobeyed explicit orders not to risk battle. The defeat was also as a result of the mercenaries peacefully withdrawing to fight for the Florentines. Petrarch censured an Augustinian monk, Jacopo Bussolari of Pavia after he successfully lead a native force to victory over a mercenary company.
[21] *Ibid.* at 100.

Each of the contracting parties to these leagues was to contribute a certain number of soldiers for a period of time, however, these efforts at collective defence rarely lasted as evidenced by the great number of leagues which were continuously being formed and reformed during the 14th century in Italy.[22]The leagues often came to a quick end when one or the other of the parties tried to hire the target of these leagues (mercenaries) outside the terms of the contract.[23] Even the Papacy was involved in these leagues.

Caferro notes that the irony of state attempts at league building was that these leagues provided employment for mercenaries, which made up the rank and file of the leagues' joint armies.[24]

Napoleonic France

Many commentators refer to this period of the French revolution in the late 18th century as the beginning of the citizen army and the decline of the use of mercenaries.[25] What is clear from a review of the frequency of use of mercenaries is that a ruler's reliance upon his citizen army was some time away.

Napoleon's *troupes étrangère* (foreign troops) was the continuation of a long tradition in France of using mercenaries. Even before Napoleon took charge of matters in France, the French revolutionary government began the recruitment of foreigners as part of their revolutionary policy and established new units of Belgian soldiers as early as 1792.[26] During Napoleon's rule, mercenaries comprised up to 13% of the total of

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[22] *Ibid.* at 99-102. Between 1347 and 1389, Siena joined 11 leagues.
[23] *Ibid.* at 100-101.
[24] *Ibid.* at 100.
[25] UN OHCHR, The Impact of Mercenary Activities on the Right of Peoples to Self-Determination, Human Rights Fact Sheet No. 28, UN Doc GE.01-46674 (February 2002) at 5.
[26] Dempsey, *supra* note 3 at 15

infantry at his disposal[27] and foreigners were not confined to the lower ranks. Records indicate that some 190 foreigners served Napoleon as Generals including some 33 Germans, 26 Swiss, 26 Poles, 24 Dutch and 7 Canadians.

Napoleon employed mercenaries for three reasons:

1. foreign units could be used for political reasons as potential inspiration for internal dissension in the enemy regime;
2. to prevent defeated soldiers from fighting against Napoleon a second time; and
3. used in less desirable or more unhealthy posts around the French Empire.[28]

Mercenaries also ensured that the commander in the field had experienced soldiers ready to fulfil their contracts of services honourably after his own native troops, motivated by more classical calls to arms, might have quit.[29]

Despite these advantages, Napoleon found his *troupes étrangère* expensive. They were expensive because a signing bonus was paid to seal the deal and in addition to the regular payment of wages on a reasonably regular basis (a new notion for soldiers to be regularly paid[30]) additional premiums over time had to be budgeted "in the form of enhanced pay and privileges and special uniforms."[31]

On November 25, 1913, Napoleon ordered that a number of the mercenary units be disbanded as a result of certain defections by a mercenary battalion earlier that fall.[32]

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[27] *Ibid.* at 17. Of the 784,000 infantry soldiers Napoleon had at his disposal in January, 1812, 103,000 were *troupes étrangère*. A extrapolated study indicates that between 1804 and 1814, of the 2,015,500 manpower losses suffered by Napoleon's armies - 644,500 were foreigners. *Ibid.* at 18.
[28] *Ibid.* at 21.
[29] *Ibid.* at 13.
[30] Professor Griffith indicates that should a mercenary in the fourth century B.C. have a choice he would choose to fight for the Egyptians as they were more reliant on them than other employers. *Ibid.* at 281. "In Egypt we never hear of strikes or mutinies, or even of soldiers' pay in arrears, the condition most common to Greek military finance." *Ibid.*
[31] *Ibid.* at 20-21.
[32] *Ibid.* at 24-25.

The surviving soldiers of six of the disbanded units were then converted into worker battalions equipped with picks and shovels rather than muskets.[33]

Despite Napoleon's seeming distrust of his *troupes étrangère* he once again made use of them during his short-lived reign in 1815.[34]

China – Ch'ing-Taiping War, 1860

During the 1860s, China was rife with rebellion. A central Manchu government was fighting the Taiping rebels when and where government armies could be raised to fight this threat to the Ch'ing government rule. A significant official and unofficial foreign presence was also found in China, primarily along the Pacific Ocean coast.

For the previous ten years of rebellion, Taiping leaders choose "the traditional strategy of conquering the northern and western parts" of China.[35] In 1859-1860 and under new leadership, the Taiping rebellion decided to drive towards the sea, towards Shanghai and control over its seaport and the revenue it could bring to the rebellion.

Shanghai was also the site of many Western national delegations and citizens and if the Taipings could gain Western support and the additional revenues that Shanghai could bring (and deny the same to the Beijing government) the rebellion could drive toward Beijing and perhaps ultimate success.[36]

By 1861 fifty percent of Chinese exports left the country through Shanghai.[37] Foreign trade brought revenue and supplies, including military arms and personnel.

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[33] *Ibid.*
[34] *Ibid.* at 27.
[35] Smith, *supra* note 2 at 4-5.
[36] *Ibid.* at 7.
[37] *Ibid.* at 8. The three most important Chinese exports were tea, silk and opium. *Ibid.*

Until the 1860s, much of the Western arms and assistance had been resisted by both the Chinese government and by the rebels.[38]

As a result of the decline in the traditional military establishment, Ch'ing officials looked to temporary armies to provide the military support which they could not provide.[39] This led to some attempts to create native mercenary armies which proved ineffective or disloyal and yet still cost the provincial governor several hundred thousand dollars a month to sustain.[40]

With the imminent advance of the Taiping rebel armies against Shanghai, three Shanghai civil and commercial leaders began to consider the use of Western armies to assist them. This was a solution which neither the Ch'ing nor the Western governments wanted for various political reasons.[41]

Necessity required action and as a result, in the early summer of 1860, both Chinese and Western civil and business leaders retained the services of an American, Frederick Townsend Ward, who began to organize the Foreign-Arms Corps to defend Shanghai.[42]

Ward's initial recruitment of Manilaman (Filipinos) was replaced by other Filipinos, Americans and Europeans, after the initial group of *lu-sung i-yung* deserted over a dispute over pay.[43] Ward's recruitment of able-bodied foreigners from amongst the various nationalities in Shanghai caused some concern. Not only was there concern about the issue of the expressed neutrality by Western nations, but, more importantly,

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[38] *Ibid.* at 8.
[39] *Ibid.* at 11.
[40] *Ibid.* at 12-13.
[41] *Ibid.* at 14 - 16.
[42] *Ibid.* at 28.
[43] *Ibid.* at 29.

the recruitment of men to serve in these contingents was a "…drain on the commercial, municipal and naval manpower…" of the various western enterprises in Shanghai.[44]

The Pirate Suppression Bureau operated as a front for this band of mercenaries with most administrative affairs relating to the operation of the Foreign-Arms Corps being handled by the Chinese *taotai* (community leaders/financiers) of Shanghai, Wu Hsü, and Yang Fang, a Ningpo banker and a former camprador of a Western company.[45]

The Foreign-Arms Corps celebrated one victory in over a year of operations. After being wounded Ward disappeared and reappeared in April, 1861 in charge of a force of 80 foreigners and called this new grouping the Shanghai Foreign Legion.[46] A few weeks later, Ward was arrested by the American authorities for violating United States' neutrality, but was ultimately released when there was some question as to his nationality (he had applied for Chinese citizenship on the day of his arrest).[47]

In the meantime, British authorities (some of whom sided with the Taiping rebels) arrested, tried, convicted and sentenced British volunteers of any corps being organized at that time.[48]

A number of points came out of the travails of the mercenary organizations. The first was that without imperial sanction and Western support, the mercenary contingents were bound to fail[49] and the solution was to place Chinese soldiers under the command of foreign officers.

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[44] *Ibid.* at 35.
[45] *Ibid.* at 30.
[46] *Ibid.* at 35.
[47] *Ibid.*
[48] *Ibid.* at 36.
[49] *Ibid.* at 37.

Despite the setbacks in 1860 and 1861, Ward rejuvenated the Foreign-Arms Corps and in 1862 had over one thousand well-trained Chinese soldiers. This new corps won a number of skirmishes and battles throughout 1862[50] and was the only positive aspect of the defence of Shanghai that year. Although attempts were made to enlist the aid of Western nations, local Shanghai officials made successful attempts at having the Chinese central government accept Ward as a Chinese citizen, converting him from a *fan-chiang* (barbarian commander) to a *lai-hua* or coming to be transformed towards the Chinese civilization.[51]

With respect to the pay received by mercenaries, evidence shows that in addition to honours and awards which the Chinese government bestowed upon Ward, he was also paid a regular salary with bonuses. He asked for a gratuity of 20,000 ($32,000 US) taels to be paid to him for every place recovered from the Taiping rebels and when Ch'ing-p'u was retaken he asked for another 10,000 taels ($16,000 US).[52] Many of these bonuses were deferred. In August, 1862, Ward claimed he was owed some 350,000 taels.[53]

Ward's soldiers were paid twice a month, but were expected to pay for their own room and board except when in the field.[54] A private was paid nine dollars per month (50% more than his Chinese army counterpart) while a captain received $200 per month ($15 for a *shao-kuan*).[55] Both Ward and Gordon found that by awarding their troops

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[50] *Ibid.* at 39-40.
[51] *Ibid.* at 55.
[52] *Ibid.* at 56. One tael was equal to 1.6 American dollars according to rates at the time. *Ibid.* at *xxiv*.
[53] *Ibid.* at 56.
[54] *Ibid.* at 89.
[55] *Ibid.* at 88.

bonuses or "dispensing awards" (*k'ao-shang*) after the capture of cities, it kept the men in line.[56]

A successor army, the Ever-Victorious Army, was also a primarily Chinese force with some Western features.[57]

After Ward's death, a British officer, Charles Gordon, took over in May, 1863. He instituted a number of reforms including increasing the discipline in the unit including amongst the American element which "'looked back with regret to the time when the Force was commanded by an adventurer like themselves…'".[58] Gordon also began recruiting Taiping soldiers into this army because of his force's high turnover rate among the other ranks due to battle losses and desertion.[59]

One of the features shared by both Ward and Gordon was they both "…exercised wide civil as well as military powers…" off the battlefield.[60] The terms of these powers and their results are beyond the scope of this thesis.

The Ever-Victorious Army did not field more than 4,000 troops and carried on its staff some 100 foreign officers.[61] Over the eighteen month period from November, 1862 until May 1864, the army cost 1,178,078 taels ($1,884,924.80 1860 US) including pay, relief grants, and gratuities.[62] The majority of the funds to support both Ward's and Gordon's contingents came from local customs revenue.[63]

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[56] *Ibid.* at 137.
[57] *Ibid.* at 100.
[58] *Ibid.* at 133.
[59] *Ibid.* at 131. This included an infusion of 2,000 rebel prisoners after one successful battle where half of the contingent deserted when Gordon announced he was moving this headquarters and forbidding them to work at their trades and lounge in their tea-shops during off hours. *Ibid.* and at 137.
[60] *Ibid.* at 136.
[61] *Ibid.* at 137.
[62] *Ibid.*
[63] *Ibid.*

The successes of these two leaders were primarily based on the quality of the personal relationships which each leader had with the Chinese officials supporting them.[64] In many ways Ward's style of having been accepted into the Chinese milieu (as much as a barbarian could be accepted) as a result of taking on Chinese citizenship and marrying the daughter of one of his benefactors, was more successful than Gordon's. Gordon, not having developed the same level of relationship, had to rely on British officials to assist him in carrying out the administration of his forces.[65] This served simply to reinforce each party's stereotype of the other.

As Professor Smith concluded, "Gordon's frustration as a Chinese officer resulted from his desire to be more than a mere mercenary at a time when a mercenary was all that China wanted."[66]

Conclusion

A number of conclusions can be draw from this review of mercenaries which are applicable to the present day including:

1. the *taglia guelfa* or leagues of fourteenth century Italy may find their partners in twentieth and twenty-first century world politics with the related problems of partners turning on each other (ECOWAS) lack of consensus (UN or AU) and changing partners (EU and former Warsaw Pact countries);
2. the mercenary companies of the Middle Ages in Italy and PMCs of today mirror themselves by their organizational structures and the range of services they provide (although today's PMCs provide more than the loot and pillage terms of reference of the fourteenth century);
3. Napoleon's employment of foreigners at senior levels is often seen today throughout the militaries of many countries (Nigerian chief of staff in Sierra Leone) instruction is provided to militaries of developing countries through programs such as the American African Crisis Response Initiative (ACRI) and the French *Renforcement des capacities*

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[64] *Ibid.* at 138-139.
[65] *Ibid.*
[66] *Ibid.* at 139.

africaines de maintien de la paix (RECAMP).[67] Canada has a similar training and instruction assistance program which is presently serving in Sierra Leone (these assistance programs are not run by or for mercenaries);

4. the risky state characteristics of China in the mid-1800s is present in many countries around the world today;
5. the reason for the attack of the Taiping rebels against Shanghai and the seaboard to China was to control the export business and is analogous to rebel attacks into and securing areas of influence in diamond bearing areas of Sierra Leone and oil bearing regions of Angola;
6. similarity between the reasons given by the Chinese and western nations in the 1800s for not wanting western militaries to be involved in internal conflict with those of today;
7. the early lack of success of Ward's mercenary armies compares with the lack of success of the 1960's mercenaries; and
8. the use of local customs revenue by Chinese leaders to pay for mercenaries is analogous to the use of cash and diamond concessions by Sierra Leone to pay the PMC it hired. Both took cash out of the local economy to assist in stabilizing the economy.

1.2 – Definition of Private Military Companies

There is no consensus on how to define a mercenary. Treaties have attempted to arrive at a definition acceptable to a wide range of states, however, those attempts (as illustrated by the discussion in the Part 2 of this thesis) simply reinforce the idea that the only widely accepted definition is that set out in Article 47 of Protocol I of the Geneva Conventions.

As a result, some writers such as Professor Thomson, define mercenarism as "the practices of enlisting in and recruiting for a foreign army."[68] From more of a participant's review of world-wide security issues and private armies, James R. Davis (a former Canadian enlisted soldier and part-time PMC employee), suggests that the mercenary industry is organized into five categories ranging from regular foreign units

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[67] Eric G. Berman and Katie E. Sams, *The Pearson Papers Paper Number 3: African Peacekeepers: Partners or Proxies?* (Clementsport, N.S.: The Canadian Peacekeeping Press, 1998) at 4-6 [Berman].
[68] Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: N.J.: Princeton University Press, 1994) at 27 [Thomson].

(French Foreign Legion and Swiss Guards) to "freebooters" or "random groups" of fighters.[69]

Individual governments have also added to the cornucopia of definitions. South Africa's *Regulation of Foreign Military Assistance Act, 1998*, No. 15 of 1998, defines mercenary activity in sub-section 1 (iv) as the "direct participation as a combatant in armed conflict for private gain". The act goes on to also make it illegal to render foreign military assistance without state approval.[70] Despite this government's best intentions, commentary on this legislation calls into question the law's efficacy as the "potential for collateral regulation of bona fide activities which have nothing to do with mercenary activities, but which may fall under the very wide umbrella of 'foreign military assistance'."[71] Similar sources have also suggested that the legislation lacks teeth in that there continues to be evidence of South African citizens participating in mercenary activities in the Sudan and yet no action is taken against them.

On February 12, 2002, the British government waded into this debate by issuing a Green paper entitled, Private Military Companies: Options for Regulation.[72] This

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[69] James R. Davis, *Fortune's Warriors: Private Armies and the New World Order* (Vancouver, B.C.: Douglas & McIntyre, 2002) at 67-69 [Davis]. Davis's five categories include:

1. *Regular Foreign Units* ("long-serving regular formations that exist integrally within a larger national military structure"),
2. *Auxiliary Foreign Units* (units formed of foreigners during a conflict and integral to the national military structure which unit is then disbanded on an end to hostilities, i.e. Flying Tigers – World War II);
3. *Private Military Companies* ("privately run mercenary organizations that Conduct combat or combat support operations.")
4. *Foreign Volunteers* ("foreign soldiers who are not formed specifically into foreign units but are incorporated into regular national formations."
5. *Freebooters* ("any individual or faction that operated strictly to achieve its own ends" – serve a range of illegal clients).

[70] *Regulation of Foreign Military Assistance Act, 1998*, No. 15 of 1998, s.3.

[71] Mark Malan and Jakkie Cilliers, "Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill" September, 1997 Institute for Security Studies, Occasion Paper No. 25 at 1 [Malan].

[72] U.K., H.C., "Private Military Companies: Options for Regulation", (London, U.K.: 12 February 2002) [Green Paper].

paper was prepared and issued by the British government in answer to evidence of the involvement of British officials and a British private military company in the sale of arms to Sierra Leone while a UN embargo against the sale of arms was in place.[73] This Green paper described the various types of services which the mercenaries, private military companies and private security companies provide without explicitly setting out definitions for each of these three actors. The Green paper concluded that the problem of definition is not only of wording but, considering the agenda of the drafters of definitions which are presently accepted, acknowledging that there are a range of operators who provide a spectrum of services, and that in practice, the categories of the actors will merge into one another.[74]

For the purposes of this paper, I will define the three main subjects of this thesis as follows:

1. mercenary – Protocol I, Article 47 definition;

2. private military company (PMC)[75] – registered or unregistered corporate bodies providing combat support functions including but not limited to: advice, training, logistical support, medical support, provision of personnel and materiel for monitoring operations, and demining and providing combat support functions including but not limited to: arms procurement, intelligence gathering, but neither participating in hostilities nor carrying a weapon capable of inflicting harm without direct connection to the person (excludes firearms or any weapon projecting an object outside the immediate reach of the person); and

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[73] International Alert, *regulating private military companies: options for the UK government (sic)* (London,U.K.: 2001) at 9 [IA-PMCs]. This has been referred to as the "Arms-to-Africa" affair in which the British High Commissioner was alleged to have supported the sale of some 28 tons of Bulgarian arms by a private military company, Sandline, to Sierra Leone, which was under a UN trade embargo. Stuart McGhie "Soldiers Inc." *Janes Defence Weekly (22 May 2002)* 23 at 23.

[74] Green Paper, *supra* note 72 at 9.

[75] The United Nations refers to these companies as military assistance companies, however, they will be referred to throughout this paper as private military companies as this appears to be the overwhelming usage throughout the literature. UN OHCHR, *The Impact of Mercenary Activities on the Right of Peoples to Self-Determination, Human Rights Fact Sheet No. 28*, UN Doc GE.01-46674 (February 2002) at 23.

3. private security company – registered or unregistered corporate body providing exclusively crime prevention and public order goods and services.

The subject of the primary interest of this thesis is the private military company. The point when a contractor or an employee of a private military company (PMC) crosses from being a person who accompanies the armed forces[76] to being an unlawful combatant pursuant to the law of armed conflict (LOAC), I define as the moment that civilian puts a weapon in his hand, over his/her shoulder or straps one to his/her belt.[77]

1.3 - The Evolution of Mercenaries into Private Military Companies

A number of factors have provided fertile ground upon which Private Military Companies (PMC) have been able to grow. These factors include:

1. the demobilization of militaries around the world;
2. reduced interest by Western nations in internal conflicts as they are no longer proxy wars for the major protagonists of the Cold War era – Somalia Syndrome (with the resultant reduced support which that entailed in both funds, personnel and materiel);
3. the continuation and acceleration of internal conflict based upon factors other than political ideology, such as economic, ethnic or religious factors;
4. weak governmental and military structures in many developing nations;
5. increased influence of trans national corporations (TNC);
6. outsourcing of military functions by Western militaries;
7. ineffectiveness of United Nations peacemaking and peacekeeping efforts;
8. the increased violence experienced by non-governmental agencies (NGOs);
9. countries seeking military assistance have begun turning to other nations for support and the conflict between political elites fighting for private financial gain; and
10. increased globalization resulting in reduced state authority.

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[76] Christine Van den Wungaert, *International Criminal Law: A Collection of International and European Instruments*, 2nd ed. (The Hague: Kluwer Law International, 2000) at 260 [ICL].

[77] A detailed discussion of the legal status of a contractor is set out in Part 4 of this paper.

Central to these issues is the increased level of instability and insecurity evident in many developing and some developed nations.[78]

Demobilization of Militaries

With the end of the Cold War, nations around the world expected a peace dividend in the form of reduced tensions. In turn, this would lead to reduced requirements for standing militaries and thereby reduced military spending.[79] While it is correct that the break up of the former Soviet Union into independent states led to significant reductions in Western military forces, the expected precondition to their reductions – reduced tension – has not materialized. This reduction in Western and former Soviet Bloc militaries continues.[80] Many commentators agree that this has led to the creation of a large world-wide pool of military personnel of various ranks with few alternatives for employment.

Although some steps have been taken to address the issue of the retraining military personnel[81], sufficient numbers of them have gravitated to one or more

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[78] Gerry Cleaver, "Subcontracting military power: The privatization of security in contemporary Sub-Saharan Africa" (2000) 33 Crim. L. & Soc. Change 131 at 137 [Cleaver].

[79] An August 10, 2000 article in the Washington Post, former Secretary of Defence Perry and former Chairman of the Joint Chiefs of Staff Shalikashvili, wrote that with the end of the Cold War, President Bush authorized Armed Forces reduction of 500,00 and President Clinton authorized another reduction of 250,000. William J. Perry & John M. Shalikashvili, "The U.S. Military: Still the Best by Far" *The Washington Post* (10 August 2000), online: The Jamestown Foundation http://iskran.iip.net/review/august/3wp.html.

[80] The June 27, 2001 issue of the Jamestown Foundation Monitor quotes Russian Defense Minister Ivanov indicating the planned reduction of some 365,000 armed forces personnel by 2005 with the bulk of the reductions occurring in 2002-2003. The Jamestown Foundation, "Pace of Russian Army Personnel Cuts to Pick Up" (2001) 7:123 Monitor (27 June 2001) online: The Jamestown Foundation <http://russia.jamestown.org/pubs/view/mon_007_123_000.htm>. In Ukraine the military has been reduced from 726,000 to the 2001 level of 305,000 armed forces personnel. David Matvey, "Voskreseniye" online: Political Science <http://www.legacyrus.com/PoliticalScience/Matvey/Voskreseniye.html> and Embassy of Ukraine in Japan, "About Ukraine: Arms Forces of Ukraine" online: Embassy of Ukraine in Japan, 2002 http://www.ukremb-japan.gov.ua/eng/ukraine/army/.

[81] NATO is assisting former Warsaw Pact militaries in this regard. "Seminars and courses on defence planning, retraining retiring Ukrainian military personnel and on military downsizing…" North American

conflicts around the world or to one of the PMC or private security companies (PSC) being established around the world.

Reduced Western interest and the "Somalia Syndrome"

Since the end of the Cold War western nations are pursuing disengagement policies throughout much of the world unless there are strategic reasons for their involvement. Other countries, having bought into the peace dividend and have reduced their presence overseas and have directed tax dollars into domestic projects.

The Security Council has looked to UN Charter Chapter VIII regional organizations "to share the burden of maintaining international peace and security for selfish reasons and not for the greater good."[82] As will be shown in Part 3, these proxies have not worked as well as western nations would have hoped resulting in even greater despair than if these proxies were not involved.

Much has also been written about the "Somalia Syndrome". This syndrome arose out of the American experience in Somalia in October 1993 and has been defined as "a refusal of Western states to intervene militarily in conflicts that do not threaten important national interests" and as Professor Howe noted "has become epidemic since U.S. battle casualties in Somalia."[83] Howe goes on to add that western militaries fear the political fallout over expanding mission terms of reference and battle casualties with the result that many nations are "highly reluctant to commit troops to peacekeeping, let alone combat situations."[84]

Treaty Organization, *NATO Handbook*, online: NATO http://www.nato.int/docu/handbook/2001/hb0304.htm.

[82] Berman, *supra* note 67 at 1-2.

[83] Herbert Howe, "Lessons of Liberia: ECOMOG and Regional Peacekeeping" (1996-97) 21:3 Int'l Security 145 at note 14 [Howe-ECOMOG].

[84] *Ibid.*

Political Élites and Financial Gain

Elite fighting one another for personal and financial gain has been identified by a number of writers as the root cause of conflict in Africa. The deployment of troops from Angola, Uganda, Rwanda and Zimbabwe into the Democratic Republic of Congo is one such example.[85] The Nigerian forces (part of the United Nations mission in Sierra Leone – UNAMSIL) were accused of undermining the UN mandate and pursuing their own agenda in a secret report prepared by the General Jetly, the Indian commander of UNAMSIL.[86] There were additional accusations that the Nigerian forces were operating in collusion with the Revolutionary United Front rebels (RUF).[87] More of this element is discussed in Part 4.

[85] Chris Dietrich, "The commercialization of military deployment in Africa," online: Institute for Security Studies http://www.iss.co.za/Pubs/ASR/9No1/Commerciallisation.html at 1 [Dietrich].
[86] Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World's Most Precious Stones* (Boulder, Colo.: Westview Press, 2002) at 95 [Campbell].
[87] Mark Malan, "'Layered Response' To an African Conflict: Or Muddling through in Sierra Leone?" online: Institute for Security Studies http://www.iss.co.za/Pubs/ACR/10No2/Malan.html at 12 [Malan - Layered].

PART 2 – INTERNATIONAL LAW

2.1 – Treaties Dealing with Mercenaries

Introduction

Until the development of the citizen armies in late 18th century, mercenaries were used extensively by various rulers to fight wars and to protect them and their nations from both internal and external forces.

The 1960s' decolonization of African nations again focused the world's attention upon the role of the mercenary. These adventurers, primarily former soldiers of Western nations, who traveled from nation to nation fighting for those who would pay for their services, caused a negative reaction in many states. International organizations immediately began the process of trying to define and outlaw them.

The activities of mercenaries throughout various emerging nations in Africa forced a reaction from the newly created regional association – the Organization of African Unity (OAU). Established on May 25, 1963, this organization developed from the Pan-African movement of the post-World War I period[88] and in 1967 initiated a committee to study mercenarism in Africa.[89] This eventually lead to the first international convention dealing specifically with mercenaries – the Convention for the Elimination of Mercenarism in Africa.

This section of Part 2 is limited to a review of the treaties touching directly upon the mercenary issue and traces the banning and regulating of mercenaries from the 1907

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[88] Alfred D., Chanda, "The Organization of African Unity: An Appraisal" (1989-92) 21-24 Zambia L.J. 1 at 3 [Chanda].

[89] Marie-France Major, "Mercenaries and International Law" (1992) 22 Ga. J. Int'l & Comp. L. 103 at 107 [Major].

Hague Convention to the United Nations (UN) International Convention against the Recruitment, Use , Financing and Training of Mercenaries (1989).[90]

Convention (V) respecting the Rights and Duties
of Neutral Powers and Persons in Case of War on Land (Hague Convention)

This treaty was signed October 18, 1907 and came into force on January 26, 1910.[91] Provisions dealing with mercenaries are set out in four articles:

Art. 4.	Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.
Art. 5.	A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.
Art. 6.	The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.
Art. 17.	A neutral cannot avail himself of his neutrality: (a) If he commits hostile acts against a belligerent; (b) If he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties. In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

The provisions of this treaty are examples of the second of two developments in international law prior to World War I and reflected nations' changing view towards the use of force against one another.[92] These new developments included the increasing use of multilateral agreements to try to discourage war and the development and codification of the first international neutrality law.[93]

These four articles are representative of how states have treated the issue of mercenaries into the twenty-first century.

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[90] "Report of the General Assembly Action" in *Yearbook of the United Nations 1989*, vol. 43 (The Hague, The Netherlands: UN, 1990) at 825 [Yearbook 1990].
[91] University of Minnesota Human rights Library, online: University of Minnesota <http:www1.edu/humanrts/instree/ainstlsl.htm>.
[92] Paul W. Mourning, "Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries" (1981-82) 22 Va. J. Int'l Law 589 at 593 [Mourning].
[93] *Ibid.*

These provisions codified the existing customary international law in effect at the turn of the twentieth century. As summarized by Damrosch, Henkin et al "international law sought to constrain external involvement in civil wars, by limiting the support that outsiders could give to participants in an internal struggle."[94]

Article four of the 1907 Hague Convention does not refer to individuals as being in violation of neutrality law but focuses on organized groups – a corps or an agency. Through this statement, nations indicated that unorganized volunteers did not pose a threat to state sovereignty.[95]

Article five requires nations to only punish violations of neutrality if the offences in question took place on their soil. This suggests that jurisdictional principles such as the principles of nationality would not apply. Even the principle of territoriality would still wait another 20 years to be further refined in *The Lotus* (1927), P.C.I.J. (Ser. A) No.10.

The states agreeing to the terms of this treaty limited the general principle of international law that the *Lotus* case would clearly enunciate to "there [being] no restriction on the exercise of jurisdiction by any state unless that restriction can be shown by the most conclusive evidence to exist as a principle of international law."[96]

Article six further emphasizes the surrender of territorial jurisdiction of the nation from which "persons" are leaving to "offer their services to one of the belligerents". Again, the neutral nation is not responsible for individuals leaving their territory as long as they did not form a corps prior to their leaving.

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[94] Lori Fisler Damrosch *et al.*, eds., *International Law: Cases and Materials*, 4th ed. (St. Paul, Minn.: West Publishing Co., 2001) at 980 [Damrosch – IL].
[95] Mourning, *supra* note 92 at 41.
[96] I.A. Shearer, *Starke's International Law*, 11th ed. (London, U.K.: Butterworth & Co. Ltd., 1995) at 184 [Starke's].

Article seventeen established two classes of mercenary. Both could not avail themselves of any rights they may have as a result of their originating countries neutrality, however, the mercenary who joined the armed forces of one of the belligerents was entitled to the prevailing treatment afforded to nationals of the conflict.

To review the effectiveness of the provisions of this treaty, especially of Article four (corps of combatants provision), we need only consider the treatment of the Abraham Lincoln Battalion of the International Brigade. This group left the United States to fight the fascist takeover in Spain and no arrests were made. Despite this group of individuals clearly falling within the "corps of combatants" definition no arrests were made nor charges laid pursuant to either this treaty or under the American law (which had evolved prior to this treaty and would have been sufficient to deal with this situation).[97]

Some of the issues which this treaty highlights reappear several more times throughout the twentieth century. These issues include: the requirement for the specificity of a crime, extra-jurisdictional issues and treatment of mercenaries when imprisoned by one of the parties to a conflict.

Convention on Duties and Rights of States in the Event of Civil Strife

This treaty was signed on February 20, 1928 and entered into force May 21, 1929.

The provisions relevant to our review include the following:

> Article 1. The Contracting States bind themselves to observe the following rules with regard to civil strife in another one of them:
> First: To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements,

[97] Mourning, *supra* note 92 at 596.

> crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.
> Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.
> Fourth: To prevent that within their jurisdiction there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favour of the rebellion.[98]

The provisions of this Convention were subsequently included and amplified in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (1970). This Declaration should be read with the UN Resolution on the Definition of Aggression, both of which are beyond the scope of this thesis.

This Civil Strife Convention incorporated the law of neutrality in internal conflicts.[99] Professor Brownlie concluded that this Convention was an expression of customary law and added that this Convention was adopted due to "incidents between the South American Republics being the result of intrigues by groups of rebels and political refugees carried on across uncertain borders and frontier zones with no policing system".[100]

A review of the Canada's *Foreign Enlistment Act*, R.S.C. 1985 c. F-28 (*FEA*) initially passed in 1937, seems to have drawn some of its provisions from this Civil Strife Convention.

Elements of the first paragraph of Article 1 are found in the state's obligation to prevent its citizens from:

1. leaving their territory (*FEA* – section 3);

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[98] *Convention on Duties and Rights of States in the Event of Civil Strife*, February 20, 1928, 134 L.N.T.S. 45.
[99] International Alert, *Regulating Private Military Companies: Options for the U.K. Government* (London, U.K.: 2001) at 22.
[100] *Ibid.*

2. gathering of elements to go overseas (sections 5 and 6);
3. crossing the boundary or sailing overseas (section 4); and
4. arming or adapting a vessel for warlike purposes (section 7).

Until the concerted attempts in the 1960's by the OAU and UN to develop a more comprehensive codification of a ban on the use of mercenaries, a definition had to also be developed.

The traditional view of mercenaries considered three elements. The first element was that this was someone who was a non-national; the second was that they were fighting for monetary gain and as a consequence; thirdly, they were usually indifferent to the claims or interests of their native country.[101]

The next two treaties introduced definitions of who was a mercenary.

Convention of the OAU for the Elimination of Mercenarism in Africa,

This treaty was agreed to on 3 July 1977 and eventually signed by 16 African nations. Pursuant to its Article 13 paragraph 2, the Convention came into effect 30 days after receipt of the seventeenth ratification. This seventeenth ratification, by Liberia, was effected on 19 July 1985. With the formal process starting in 1967,[102] it seems that the countries which appeared to have most at stake on this issue and most often advocated for and introduced UN General Assembly (GA) resolutions dealing with mercenaries, could have attended to this issue somewhat more expeditiously. As at November, 2002, only 23 nations have ratified this convention. The last country to ratify the Convention was Zimbabwe – January 27, 1992. In November, 2002 Africa Confidential listed some 54 nations in Africa.

The OAU Convention defines a mercenary in Article 1 as follow:

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[101] *Major, supra* note 89 at 107.
[102] *Ibid.*

> Under the present Convention a 'mercenary' is classified as anyone who, not a national of the state against which his actions are directed, is employed, □egis□h or links himself willingly to a person, group or organization whose aim is:
>
> (a) to overthrow by force of arms or by any other means the government of that Member State of the Organization of African Unity;
> (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State;
> (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.[103]

Article 2 paragraph 1 characterized the actions of a mercenary committing the acts outline in Article 1 to be the new crime of "crime against peace and security" in Africa. Paragraph 2 of Article 2 also states that anyone who recruits, takes part in recruiting, training, financing, or gives protection to a mercenary also commits a crime against peace and security of Africa.[104]

The obligations of OAU states with respect to mercenaries are dealt with in Article 3. Each state undertook to prevent nationals/foreigners living in their territory from committing Article 2 offenses, prevent the entry or passage of mercenaries or equipment across their territory, forbid organizations from employing mercenaries against OAU members, exchange intelligence about mercenary activities in Africa, forbid Article 2 crimes from taking place and were obligated to introduce legislative measures and severe penalties to implement the terms of this Convention.[105]

The OAU definition is very narrow as compared to those definitions which are to come later. This definition clearly served the OAU purposes as one of this organization's few successful results was the provision of diplomatic and political

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[103] Mourning, *supra* note 92 at 613.
[104] *Ibid.*
[105] *Ibid.* at 614.

assistance to the various national liberation movements in their struggle for independence from colonial rule.[106]

Member states would not violate the provisions of this Convention if they hired mercenaries to provide internal security or used them to attack a non-member state. As stated in the British Green Paper, this OAU definition would not have included the PMC Executive Outcomes in Sierra Leone or Angola and would probably not have included the "White Legion" employed by President Mobutu during his last days in power. [107]

Although this definition dealt with particularizing the actions which are a crime, it did not touch the issue of motivation – why is someone fighting for a nation or a movement other that of one's own country.

It will be left to the next treaty to add the reward aspect to the definition of mercenary.

Protocol Additional to the Geneva Conventions of 12 August 1949, and
Relating to the Protection of Victims of International Armed Conflicts (Protocol I),

This treaty is part of the chain of the law of armed conflict or humanitarian law known as *jus in bello*. The purpose of *jus in bello* is to regulate how warring nations are to conduct war (how they are to treat each other's combatants and non-combatants). As indicated by its title, this treaty was as a result of efforts directed at "bringing the 1949 Geneva Law up to date".[108] Protocol I not only updated the law but made several fundamental changes to the existing law of armed conflict. Some of these changes included:

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[106] Chandra, *supra* note 88 at 11.
[107] Green Paper, *supra* note 72 at 7.
[108] L.C. Green, *The contemporary law of armed conflict*, 2nd ed. (Manchester, U.K.: Manchester University Press, 2000) at 50 [Green].

1. self-determination struggles by liberation movements are subject to humanitarian law;
2. the definition of combatant was changed to include coverage of people fighting for liberation movements without uniforms;
3. extends the protection to civilians and sets out that protection; and
4. defines mercenaries and denies them combatant status.[109]

On June 8, 1977 The Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts adopted this treaty and it entered into force December 7, 1978.[110]

Of the 102 articles, the new rules relating to mercenaries in a *jus in bello* context are found in Article 47.

> Article 47 – Mercenaries
>
> 1. A mercenary shall not have the right to be a combatant or a prisoner of war.
> 2. A mercenary is any person who:
>
> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) Does, in fact, take a direct part in the hostilities;
> (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) Is not a member of the armed forces of a Party to the conflict; and
> (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[111]

Protocol I is interesting from a number of perspectives. Despite the conference's general intent of defining, refining and expanding humanitarian law to protect as many people as possible, it eliminates individuals who fit into the Article 47

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[109] *Ibid.* at 50-51.
[110] Juan Carlos Zarate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder" (1998) 34 Stan. J. Int'l. L. 75 at 129 [Zarate].
[111] ICL, *supra* note 76 at 364.

definition from that protection. Article 47 removes the presumed right set out in Article 45 paragraph 1 which states, in part, "[a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore protected by the Third Convention..."[112] Article 47 also removes mercenaries from the protection afforded to combatants. This is a critical distinction in that combatants are entitled to the treatment set out in the Geneva Conventions of 1949 if they are wounded or taken prisoner. Combatants are also protected from criminal prosecution if they comply with the proper conduct during hostilities.[113] One commentator indicated that the effect of this provision is the outlawing of mercenaries. Mercenaries are now able to be charged with criminal offences and executed (if that is the penalty) because of the lack of coverage that the combatant designation would otherwise allow.[114]

Professor L.C. Green, after reviewing the provisions of Article 47, concludes that the "...mercenary is not devoid of all protection. Since he is not a combatant, he is presumably a civilian..." unless he is considered an unlawful combatant.[115] Prof. Green continues that even with this change in circumstance the mercenary would be entitled to a fair trial and the protection of Article 75 of Protocol I.[116]

Article 75 would apply to mercenaries in that it would apply to "... persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under ... this Protocol."[117] The party having power over a mercenary shall

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[112] *Ibid.* at 363.
[113] Green, *supra* note 108 at 102-106.
[114] Major, *supra* note 89 at 38.
[115] *Ibid.* at 115.
[116] *Ibid.*
[117] ICL, *supra* note 76 at 376.

treat that person humanely, without distinction of any criteria, and that a mercenary is entitled to certain fundamental guarantees and be free from torture, murder, outrages to personal dignity or threats to commit these and other listed acts.[118] Paragraph 4 of Article 75 goes on to list the "recognized principles of regular judicial procedure" which need to be followed prior to a sentence being passed or penalty executed.

Cumulative Definition of Mercenary

After reviewing the definition section of Article 47 (paragraph 2) the one overriding consideration is that the stated definition is cumulative.[119] All six elements must be proven prior to someone being classified as a mercenary and having the combatant/non-combatant and prisoner of war protections no longer applicable to them. To also quote probably one of the most quoted comments on Protocol I's definition, "any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him!"[120]

Subparagraph (a) – specially recruited

By including the provision that the person must be "specially" recruited to fight, the drafters attempted to deal with the issue of volunteers who join a foreign army such as the French Foreign Legion[121] as well as the issue of volunteers who may join the fight for ideological, religious or reasons other than financial ones. Prior to this treaty, mercenaries serving in a belligerent force were treated as volunteers for the purposes of combatant and prisoner of war status.[122]

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[118] *Ibid.*
[119] Green, *supra* note 108 at 115.
[120] Montgomery Sapone, "Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence" (1999) 20 Cal. W. Int'l. L.J. 1 at 38 [Sapone].
[121] Major, *supra* note 89 at 110.
[122] Green, *supra* note 108 at 108.

Subparagraph (b) – direct part in hostilities

An important feature of this definition is the requirement to actually fight – to take a direct part in the hostilities. One could have all the trappings of a mercenary but without this element a mercenary would be a civilian by another name. As a result, one would think that someone operating only as an advisor to a armed force would not be held to be a mercenary. With the increasing use of remote-operated equipment for both observation and the delivery of ordinance onto the enemy this may prove to be another factor to consider as it would be more difficult to identify which combatants are taking a direct part in the hostilities.[123] Nevertheless, as A. Rosas put it, "the distinction between an adviser (sic) and a mercenary may be a matter of taste".[124] The national liberation movement in the Sahara – Polisario – indicated as much when it stated that the French technicians it captured in Mauritania would be treated as mercenaries.[125]

Another illustration of the potential impact of this particular subparagraph was considered in an Angolan tribunal situation in 1967, prior to the enactment of Protocol I. The tribunal of the Peoples Republic of Angola provided the world with an example of the potential justice which would be applied to mercenaries. Each of the 13 western mercenaries was charged with the crime of being a mercenary which the court derived from four sources of international law.[126] These sources were:

1. the four UN resolutions to-date on the subject of mercenaries;
2. the 1967 appeal from the heads of state of the OAU requesting nations to enact law outlawing mercenaries;
3. the 1971 statement on mercenary activity adopted by the OAU; and
4. the Nuremberg crimes against peace definition.[127]

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[123] Sapone, *supra* note 120 at 39.
[124] Major, *supra*, note 89 at 111.
[125] *Ibid.*
[126] Mourning, *supra* note 92 at 602.
[127] *Ibid.*

The Angolan tribunal held that the accused were illegal combatants, therefore, outside the Geneva Conventions protection. This conclusion was arrived at after hearing evidence that firstly, 11 of the 13 did not commit homicide, secondly, that there was no evidence that they even took part in the fighting. The defense had also argued that they should be entitled to prisoner of war status and that no provisions of the Geneva Conventions authorize prosecution solely based upon the basis of his mercenary status. After being designated as illegal combatants, the tribunal also determined that they were mercenaries and sentenced them to death. [128]

Subparagraph I – personal gain

This is the first treaty which includes within its definition the element of motivation. This element is controversial as not all agree that motivation should be part of what defines a mercenary.[129]

A volunteer motivated by ideology would not be a mercenary, however, as noted in the Green Paper, "[v]olunteers (eg. Islamic militants in Afghanistan, Chechnya or the Balkans) are frequently paid and money may be as much a part of their motivation as ideology."[130]

One would think that in most if not all situations a mercenary is well paid, well fed and leaves with what would amount to a significant retirement package.

The low-budget wars fought, for example, in the Balkans and in Zaire during the 1990's proved otherwise. Many mercenaries fighting for Croatia had to pay their own

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[128] *Ibid.* at 603.
[129] Major, *supra* note 89 at 112.
[130] Green Paper, *supra* note 72 at 7.

way there and those holding the rank or position of sergeant would be paid the Deutschmark equivalent of $30 U.S. per month and perhaps wait months to get paid.[131]

A Serb combat commander who worked in Zaire indicated that after fighting for four years he had "…just enough money every day for bread, a pack of cigarettes and a drink."[132]

This stands in contrast to the mercenary company Executive Outcomes (EO), a South African based company which had signed a contract with the government of Sierra Leone.[133] The terms of the contract were if EO could rout the Revolutionary United Front (RUF) from the diamond mine area of Sierra Leone, EO would grant it rights to those mines.[134] After completing their part of the bargain, EO sold their rights to a subsidiary of a Canadian exploration company, DiamondWorks Ltd.[135] As noted elsewhere, employees of Executive Outcomes would still have maintained the Geneva combatant and prisoner-of-war protections as at least one of the six elements was missing from their description.

After examining the mercenary issue, the British Diplock Committee report of 1976 commented on this issue of motivation by stating: "… any definition of mercenaries which required positive proof of motivation would … either be unworkable or so haphazard in its application … as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it."[136]

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[131] Sapone, *supra* note 120 at 15.
[132] *Ibid.*
[133] Campbell, *supra* note 86 at 76.
[134] *Ibid.*
[135] *Ibid* at 77.
[136] *Ibid.*

Subparagraph (d) – excludes nationals/residents

History has shown that most mercenaries are of a different nationality than the hiring belligerents. Major raises this point by indicating that the wording of this paragraph "may encourage nationals or residents of a state which is a party to a conflict to enrol as mercenaries with the forces fighting against the state of which they are nationals or residents."[137] This comment had the potential of being met during the period shortly after the break-up of the U.S.S.R. The author knows of situations where Canadians of various ethnic origin prepared for and in cases left Canada to be in the service of these emerging nations of which many were citizens.

Subparagraph (e) – service in armed forces of a party

A factor not considered by the drafters or perhaps left out of the final draft, was the issue of time – time of service in the armed forces of a party to the conflict.[138] Major suggests that the parties to the conflict could disguise their use of mercenaries by enrolling them in their armed forces.[139] The Special Rapporteur on the mercenary issue noted exactly this issue in his 1994 report.[140] He noted that the Croatian Army commissioned a number of foreign mercenaries as officers and that their official position was that its military units did not include mercenaries, but rather volunteers of Croatian origin. By virtue of the principle of *jus sanguinis* these persons were regarded as Croats.[141]

The book *War Dogs: British Mercenaries Tell Their Own Story* is a recounting of the "adventures" of a group of former British soldiers who become mercenaries

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[137] Major, *supra* note 89 at 112.
[138] *Ibid.* at 113.
[139] *Ibid.*
[140] Sapone, *supra* note 120 at 39-40.
[141] *Ibid.*

during the pre-1996 period in the Balkans.[142] Amongst the book's 25 photographs is a picture of a Croat identification card with the picture and the alias of the "officer" of the group.[143] The caption to the photograph reads "Kit Freeman aka (sic) Darren Abbey – officers (sic) ID used frequently in tight situations."

This book also mentions that the band of mercenaries took orders at one time from a "Commander Florez"[144] who was Eduardo Roses Flores, a Spanish ex-journalist who was commissioned as a Colonel by the Croats to command the First International Company of Croatia.[145]

Subparagraph (f) – official duty from another State

A person taking part in the conflict as a result of his or her nation sending them, is not considered a mercenary. This provision has been variously cited as ensuring the focus of state intervention would remain on private rather than government-sponsored intervention.[146] This same factor arose during the negotiations surrounding the Nigerian proposal for regulation of mercenaries that eventually lead to the 1989 UN Convention being signed.[147]

In conclusion, we have been able to show that this treaty had some significant flaws – the most significant being its cumulative aspect. Prof. Taulbee submits that some of the more notorious mercenaries of the 1960s, such as "Jean 'Black Jack' Schramme (a long time resident) who fought in the Congo, nor the French Foreign Legionnaires, nor the American 'crippled eagles' who fought in Rhodesia fall within the

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[142] Keith Cory-Jones, *War Dogs: British Mercenaries Tell Their Own Story* (London, U.K.: Arrow Books Limited, 1997) [War Dogs].
[143] *Ibid.* at 73.
[144] *Ibid.* at 78.
[145] Sapone, *supra* note 120 footnote 237.
[146] Major, *supra* note 89 at 113.
[147] Mourning, *supra* note 92 at 610.

definition."[148] Its other significance is that it was the first chink in the armour of humanitarian law. It is this writer's submission that by removing mercenaries from the protection afforded to all in the Geneva Conventions and Protocols, this precedent could be used to exclude others from the protections which most nations want to allocate to those involved in armed conflict. The U.S. arguments for the development of a definition of unlawful combatant and the resultant exclusion from many of the rights that even the U.S. struggled to secure is one example of this slippery slope.

International Convention against the Recruitment,
Use, Financing and Training of Mercenaries, 4 December 1989.

Beginning in 1980 and while the ink was still drying on the ratifications of Protocol I, nations began negotiating the terms of this treaty.[149] On December 4, 1989, this treaty was adopted by the UN General Assembly (UNGA) pursuant to UNGA Resolution 44/34 without a vote.[150] The sponsors of this treaty were Democratic Yemen, Ethiopia, Italy, Suriname, and Ukrainian SSR.[151] This treaty entered into force on October 20, 2001.[152]

As of July 2003, the only Western nations to have ratified this treaty are Italy (August 21, 1985) and Belgium (May 31, 2002).[153] Canada abstained during the UNGA votes on resolutions relating to the signing of this Convention and in 1992

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[148] James Larry Taulbee, "Mercenaries, Private Armies and Security Companies in Contemporary Policy" (2000) 37:4 International Politics 433 at 438 [Taulbee – Mercenaries].
[149] Major, *supra* note 89 at 114.
[150] Yearbook 1990, *supra* note 90 at 825.
[151] *Ibid.* at 827.
[152] UN OHCHR, *The Impact of Mercenary Activities on the Right of Peoples to Self-Determination, Human Rights Fact Sheet No. 28*, UN Doc GE.01-46674 (February 2002) at 17 [Fact Sheet 28].
[153] University of Minnesota Human rights Library, online: University of Minnesota <http:www1.edu/humanrts/instree/ainstlsl.htm>.

began voting against these resolutions.[154] Canada has remained opposed to resolutions drawn on this subject to the present day.[155]

The convention's first Article spells out the definition of mercenary that reads word-for-word like Article 47 of Protocol I except that clause 47, 1., (b) of Protocol I ("does, in fact, take a direct part in the hostilities") has been eliminated. The text of Article 1 is reproduced and reads as follows:

> Article 1
>
> For the purposes of the present Convention,
>
> 1. A mercenary is any person who:
>
> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
>
> (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
>
> (d) Is not a member of the armed forces of a party to the conflict; and
>
> (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
>
> 2. A mercenary is also any person who, in any other situation:
>
> (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :
>
> (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
>
> (ii) Undermining the territorial integrity of a State;
>
> (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
>
> (c) Is neither a national nor a resident of the State against which such an act is directed;
>
> (d) Has not been sent by a State on official duty; and
>
> (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.[156]

The drafting committee was faced with the question upon whom to focus the attention of this Convention – the mercenary or those who promote or encourage them

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[154] UN, *Yearbook of the United Nations 1992* (Dordrecht, Netherland: Martinus Nijhoff Publishers, 1993) at 733-34 [Yearbook 1992].

[155] UN, *Yearbook of the United Nations 1998* (U.S.: Martinus Nijhoff Publishers, 2001) at 662 [Yearbook 1998].

[156] Yearbook 1990, *supra* note 90 at 825.

through various types of conduct.[157] The Convention developed a combined approach of targeting the mercenary, persons assisting them and state parties.[158] The Convention also recognized another factor which had begun taking on an increasing role upon the world stage – that of the criminal element, the drug trafficker specifically.

Article 1, Paragraph 1 – definition

Except for the elimination of the requirement to participate directly in hostilities this Convention mirrors the Protocol I mercenary definition and as a result, the discussion dealing with Article 1 of Protocol I applies here.

With respect to the hostilities element, this change may dispense with a defense lawyer making the argument that there was no direct participation in hostilities as was noted earlier in the Angolan trial, but one could surmise that if an individual has been brought to trial by a state then both the accused and his lawyer should be shot again, in accordance with the earlier commentary. The Angolan situation in 1967 is ample evidence of how a mercenary will be treated and how "the law" will be red to meet the objectives of the prosecuting tribunal or government (depending upon the strength of the separation of powers).

Article 1, Paragraph two – overthrow of government/constitution

What is of interest within the definition article is the addition of paragraph 2 which has elements of the definition provisions of the OAU Convention.

The addition of paragraph 2 has at least three immediate effects: (1) both governments and insurgency groups hiring mercenaries could be held to account; (2) persons who are sent by a state on official duty remain exempt; and (3) that the

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[157] Fact Sheet 28, *supra* note 152 at 18.
[158] *Ibid.*

discussion relating to Protocol I and clauses 1 (d) and 1 (e) apply equally to this effort at codification.

As a result of the addition of sub-clauses 1, 2, (a), (i) and 1, 2, (a), (ii) both governments and insurgency groups could be held to account for their support of mercenaries. It is clear that the reading of these clauses prevent insurgencies from hiring mercenaries especially if they are looking at overthrowing the government, undermining the constitutional order or territorial integrity of a state. This provision does not ban insurgencies from developing in countries, although it does make it an offense to use mercenaries as part of that insurgency if the other provisions are also found.

Other provisions – against individuals

As this Convention is entirely geared to dealing with the mercenary issue, it deals with other areas not covered by any prior treaty. This Convention makes it an offense not only to commit the offence of being a mercenary but attempting to commit one of offences (Article 3, para. 1). Those assisting a mercenary or a would-be mercenary also commit an offence (Article 3, para 1).

Other provisions – against states

State sovereignty is also infringed upon as state obligations are significantly increased than before. By signing and ratifying this Convention, states obligate themselves to:

1. not recruit, use, fund, or train mercenaries and to introduce laws to that effect (Article 5);
2. prevent mercenary activities by preventing preparations for mercenary from taking place on their territory (Article 6);
3. participate in world-wide cooperation to prevent the prohibited activities (Article 7);

4. establish territorial and national jurisdiction over transportation used by mercenaries and over the mercenaries themselves (Article 9);
5. take and hold mercenaries in custody to enable criminal or extradition proceedings to take place (Article 10);
6. prosecute an alleged offender if it does not extradite him (Article 12); and
7. assist other states in the prosecution of mercenaries by supplying all evidence avail to them (Article 13).

The drafters have also involved the UN Secretary-General in the various processes under this Convention. Pursuant to Article 10 paragraph 2, the UN Secretary General may be informed when an alleged offender is taken into custody by a state and shall be informed of the final outcome of proceedings taken by the state against the alleged offender (Article 14). This office is to then notify other concerned states of the results of that prosecution (Article 14).

Impact on mercenaries

The conflict between the principle of universality of protection and the taking away of the protection from mercenaries found in Protocol I is reconciled in this Convention. By virtue of Article 11 an alleged offender "shall be guaranteed" fair treatment at all stages of proceedings and will be guaranteed all the rights provided for in the laws of the prosecuting state. Article 16 further states that the terms of this Convention "shall be applied without prejudice to: ... the law of armed conflict and international humanitarian law, including the provisions relating to the status of combatants or of prisoner of war." The question still remains as to the treatment which will be afforded an alleged mercenary if or when they fall into the hands of one of the state parties who would be bound by the fair treatment provision. The UN's own documents cast some doubt on this provision where their fact sheet on the mercenary issue states that when dealing with this provision "[t]hroughout the proceedings, the

alleged offender should benefit from fair treatment and judicial guarantees."[159] Little wonder that many nations have neither signed nor ratified this Convention when the UN seems to have so little confidence in its own work.

This Convention is a more comprehensive measure to attempt to control mercenaries as long as states comply. Some commentators note that this Convention "confirms the judicial character of the United Nations resolutions and declarations condemning mercenary activities".[160] This writer would argue that this is not the case. The Convention may include issues raised in UN resolutions and declarations, but these UN vehicles still maintain their place in the non-binding bin of UN law and precedence.[161]

Major raises three concerns with the issue of mercenaries which are not addressed by the Convention. These concerns are: (1) that state jurisdiction over mercenary activities falls short of the jurisdiction over piracy, genocide and other universal crimes, (2) that the final provisions did not address the treatment of the aggrieved and offending countries as earlier drafts of this Convention had, and (3) the lack of a monitoring machinery.[162]

With respect to the applicability of the universal crime suggestion, it has only been since the de-colonization movement of the 1960's and 1970's that the mercenaries' negative reputation has become negative and that the crime of mercenarism first codified in the OAU Convention has not come near to meeting customary international law requirements as other universal crimes have. A number of

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[159] Fact Sheet 28, *supra* note 152 at 19.
[160] Major, *supra* note 89 at 132.
[161] Hugh M. Kindred *et al*, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto, Ont.: Emond Montgomery Publications Limited, 2000) at 157 [Kindred].
[162] Major, *supra* note 89 at 132-33.

countries agreeing with both the OAU Convention and this Convention do not even comply with the terms of this Convention (Angola, the Congo, Zaire, Ukraine, and Nigeria have either employed or were the source of mercenaries throughout the 1990's).[163]

An earlier draft of this Convention had included two provisions that did not survive to the final draft. Those provisions included the ability of a state suffering from the effects of mercenaries having the right to claim reparation from a state which is guilty of either an omission or act which violated the peace and security of a state (the second provision).[164] It is likely that any litigation would have to take place before the International Court of Justice and state consent is required. As a result, it would appear to this writer that this issue was some political window dressing not reflective of reality but intended to either embarrass the opposing side or be used as a bargaining chip with little likelihood of success.

The difficulty with a monitoring function is the same issue raised by writers, such as John Austin, with respect to the weakness of international law – that of the lack of enforceability. [165] If a state is not prepared to consent to enforcement it does not happen.

Nigerian Draft Convention on Mercenaries

In 1980 at the 35th Session of the UNGA, the Nigerian delegation presented a draft Convention for consideration. The proposed definition remained the definition used in Protocol 1. The one fundamental difference between the final 1989 Convention

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[163] Zarate, *supra* note 110 at note 345.
[164] Major, *supra* note 89 at 133.
[165] John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (New York City, N.Y.: The Humanities Press, 1965) at 142 [Austin].

and the proposal was that the proposed draft considered both aggrieved and offending countries.[166] The draft included, as part of it's definition of the crime of mercenarism, this crime's impact "against peace and security of a State."[167] The draft also established a reparation regime whereby the aggrieved state could look to the offending state for reparations in those situations where the aggrieved state has not been able to secure criminal prosecution of the alleged offenders.[168] The anticipated effect was to encourage the nations where many mercenaries originate to begin to seriously address the mercenary issue.

The Nigerian proposal was representative of the efforts of the Third World countries.[169] The response to this draft by western countries was based on their objection to three elements.

The first objection was to the increased degree of responsibility cast upon the alleged offending state. The argument was that it would be unrealistic to expect a State to have such a degree of control over its citizens especially while they were overseas.[170] Other nations asked why they would have to wait until the prosecution of alleged offenders before making a claim for reparation.[171]

The second objection was to the specifics of the criminal charge. Some of the Western states proposed that the alleged offender be prosecuted for specific acts of war, rather than their status of a foreign national fighting someone else's war.[172] The result was a continued reliance upon the Protocol I provision of participation in hostilities.

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[166] Mourning, *supra* note 92 at 607.
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.* at 608.
[170] *Ibid.* at 609.
[171] *Ibid.*
[172] *Ibid.*

This position was then attacked by some Third World nations arguing that there was "no sound basis" for such a limitation.[173] In the end, this particular Third World notion survived into the final Convention draft.

As Mourning concludes, Third World states sought a more expansive definition of what constitutes a mercenary as well as increasing the responsibility of those states from which mercenaries emanate.[174]

Conclusion

The most evident conclusion with respect to international agreements dealing with mercenaries is that there is no agreement on this issue.

Western nations (and now former Warsaw Pact countries) generally oppose these provisions as they tend to be the suppliers of mercenaries to the other countries. The employing countries tend to be Third World countries that express a desire and expend significant energy in attempting to ban mercenaries and yet still employ them on a regular basis (a CNN broadcast watched by the writer on December 1, 2002, indicated that, with the help of mercenaries, the army of the Ivory Coast had defeated the rebels).

Historically, mercenaries were an accepted part of "just wars" and the future prospects for greater compliance of laws outlawing mercenaries is not evident on the horizon of world conflict.

2.2 – The Legal Basis for Sovereignty and Obligation

One of the fundamental principles in international law is the principle of state sovereignty. Implicit within an understanding of state sovereignty is the related principle of non-intervention.

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[173] *Ibid.*
[174] *Ibid.* at 611.

To support the thesis that there is legal justification for the use of private military companies by the United Nations, one must do one of two things. Either dispense with the notion of state sovereignty or advocate for inclusion of humanitarian intervention as one of the exceptions to state sovereignty and its corollary principle of non-intervention.

This section of Part 2 reviews the international law of sovereignty and obligation using the "teachings of the most highly qualified publicist of various nations."[175] By tracing the chain of legal thought from the Middle Ages through the classics of international law during the Renaissance to what the writer will refer to as the post-Westphalian period we arrive at the conclusion that with state sovereignty there are state obligations. If those obligations are not met, then others are obligated to act. We shall also review elements of the Brownlie/Lillich debate to see how the modern debate on humanitarian intervention is unfolding.

Defining states

Critical to our discussion is consideration of the elements of statehood because the principle of non-intervention is based upon statehood. If a country loses its designation of statehood then intervention on behalf of the people of a former state by an uninterested party, such as the UN, is justified. In fact it may be a responsibility of the UN to do so pursuant to its Charter.

There are four elements to the definition of statehood. These elements – permanent population, defined territory, government, and the "capacity to enter into

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[175] Lori Fisler Damrosch *et al.*, eds., *Basic Documents Supplement to International Law: Cases and Materials*, 4th ed. (St. Paul, Minn.: West Publishing Co., 2001) at 34 [Damrosch – Materials].

relations with other states"[176] – have been codified in the 1933 Montevideo Convention on the Rights and Duties of States and have been accepted as part of customary international law.

The presence of all these elements at the same moment would define the existence of a state, however, "the absence of one or more of these elements … does not necessarily deprive a State of its international personality."[177]

The first two elements – population and territory, have no minimum numbers for qualification as a state.[178] Nevertheless, the issue of territory has posed some serious problems in the past. In reviewing the status of Israel in 1948, Professor Philip Jessup indicated that "many States have begun their existence with their frontiers unsettled."[179] The critical question is whether "there [is] some portion of the earth's surface" where the state's people live and where, more importantly, its government rules.[180] In many risky states, this element is often in question.

When considering the third and fourth elements of this definition – government ruling with the ability to enter into relations with other states, Kindred regards the governmental element as "central to the candidature for statehood."[181] This element can be an issue when new states are established as well as when states fall into anarchy. Kindred indicates that in the past the UN and other bodies have been too quick to approve an application for membership (the Congo in 1960 and the former states of the Former Republic of Yugoslavia in 1992) especially while fierce struggles for control of

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[176] Kindred, *supra* note 161 at 12.
[177] William R. Slomanson, *Fundamental Perspectives on International Law*, (Toronto, Ont.: Nelson Thomson Learning, 2003) at 55 [Slomanson].
[178] Kindred, *supra* note 161 at 13.
[179] Slomanson, *supra* note 177 at 57.
[180] *Ibid.*
[181] Kindred, *supra* note 161 at 13.

the state were still raging.[182] Somalia in 1992-1993 fell into disarray when the government fell and was replaced by a divided territory ruled by warlords.[183] The UN intervened, attempting to bring order to the chaos and provide humanitarian assistance to the people of Somalia.

The lack of an ability to enter into relations with other states (the fourth element) has negative consequences for a would-be state. This element can prevent the recognition by another state (Ukraine not recognized by the United States (US) until the US was sure that Ukraine was independent of Russia) and impacts directly on the issue of independence, which is "an essential factor for statehood."[184]

Defining sovereignty

Flowing from statehood is the concept of sovereignty, which was enunciated by Judge Alvarez in the *Corfu Channel*[185] case as "the body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States."[186]

Despite successive attempts at defining sovereignty, it has proven to be an elusive concept which has experienced change over the course of the history of international law. As stated by Shearer in *Starke's International Law*, "sovereignty is therefore a term of art rather than a legal expression capable of precise definition."[187]

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[182] *Ibid.*
[183] *Ibid.* at 14.
[184] *Ibid.* at 15.
[185] *Corfu Channel Case (United Kingdom v Albania)*; Merits, [1949] I.C.J. Rep. 4.
[186] Damrosch - Materials, *supra* note 175 at 4.
[187] Starke's, *supra* note 96 at 91.

Henkin argues that due to its imprecise nature, sovereignty has become a catchword serving national myths with the result that it has become a "substitute for thinking and precision."[188]

Although sovereignty is an imprecise term, writers agree that there are duties and responsibilities that flow from being a sovereign or independent nation. Shearer sets out the different state rights and obligations as follows:

TABLE 1: State Rights and Responsibilities

RIGHTS	RESPONSIBILITIES
• Exclusive control of domestic affairs • Power to admit and expel aliens • Privileges of its diplomatic envoys abroad • Exclusive jurisdiction over crimes committed within its territory	• Not to perform acts of sovereignty in other state territory • Abstain and prevent agents/subjects from committing violations of other state's territorial supremacy and independence • Not to intervene in the affairs of another state

[189]

Despite the appearance of order in Table 1, writers in the late twentieth and early twenty-first century have pointed to problems with what is a generally accepted principle of international law.

On 20 September 1999, the Secretary-General of the UN, stated that "state sovereignty … is being redefined by the forces of globalization and international cooperation" and that "the state is now widely understood to be the servant of the people and not vice versa."[190]

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[188] Damrosch - Materials, *supra* note 175 at 4.
[189] Starke's, *supra* note 96 at 91.
[190] Damrosch - Materials, *supra* note 175 at 7.

Despite what may be an avalanche of commentators concluding that state sovereignty needs to be "trumped" by the principle of humanitarian intervention, there remain many writers refusing to yield to this new conclusion. In a lecture delivered in 2001, Professor Ian Brownlie (a member of the International Law Commission) dismissed these suggestions of change in the meaning of state sovereignty and non-intervention.[191] Brownlie argues that despite changes to global politics in the 1990s, the interests of individual states remain the same and as a result, their view of international law remains conservative with the result that we should look at no changes to the historical view of state sovereignty.[192] The result is that there are few justifications for intervention.

The legal argument supporting intervention will now be developed by joining the various links in the chain of legal thought on the subject of state sovereignty, sovereign responsibility and humanitarian intervention. Our chain of legal theorists extends from the Middle Ages through the Renaissance period to post-Westphalia thought and ends in the present day.

The Middle Ages

By the thirteenth century the Normans in Britain had developed legal process as well as a theory of government supported by legal literature.[193] As a result, our first link in the chain begins with Anglo-American law's second great treatise, *Bracton* named for the royal judge, Henry de Bracton, and written between 1220 and 1230 AD.[194]

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[191] Ian Brownlie, "International Law and the Use of Force by States Revisited" (2001) 21 Aust. YBIL 21 [Brownlie].
[192] *Ibid.* at 21.
[193] Daniel R. Coquillette, *The Anglo-American Legal Heritage: Introductory Materials* (Durham, N.C.: Carolina Academic Press, 1999) at 61 [Coquilette].
[194] *Ibid.*

Bracton

Several passages from *Bracton*, are relevant to our review of a ruler's obligations. These obligations may be summarized as follows:

1. "everything connected with the peace, that the people entrusted to his care may live in quiet and repose, that none beat, wound or mistreat another, … maim or kill anyone";
2. he who causes "the laws, customs and assises … ought himself to observe them in his own person";
3. the king should be restrained "… lest being unbridled, he be drawn to injustice";
4. that the king's power "is of *jus* not *injuria*" – law not infringing upon others rights;
5. what the king forbids others to do he should not do himself; and
6. a king should 'rule well" because when he "oppresses by violent domination the people entrusted to his care" he becomes a tyrant.[195]

These passages are relevant in that they establish the standard of what is expected of a king/ruler/government. The ruler's authority flows from God. Bracton states that if the king treads into *injuria*, "when he deviates into injustice" – he does the devil's work. The next step is that the devil's doer must be cast out because of becoming a tyrant.[196]

Bracton also deals with the issue of the power of the sovereign within his realm. "The king has no peer in the realm,…" and "… has ordinary jurisdiction and power over all who are within his realm."[197]

From this it can be concluded that a king has jurisdiction over his own people, his own land and the laws in his realm. When he crosses the line of either deviating into injustice and/or by unbridling his power committing those things that he prevents his subjects from doing, the result is that he violently oppresses his people. The result is

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[195] *Ibid.* at 91-92.
[196] *Ibid.* at 92.
[197] *Ibid.* at 91.

that the king loses his legitimacy to rule and intervention may occur. A king's power is not unlimited and if he strays from those limits the king loses his legitimacy to hold power.

The transition period of the twelfth to the thirteenth century, is seen by some as having particular significance to philosophy – a period of the Latin West coming into contact with the works of Greek, Jewish and Arabian philosophers.[198] One issue which was debated during this period of legal history was the problem of who had the authority to wage war in just war theory. The debate raged between those who believed only the emperor or the pope could wage war and those who believed any feudal lord without a superior could do the same.[199] St. Thomas Aquinas (philosopher, teacher, writer, lecturer at the papal curia in Italy)[200] tackled the problem of "incorporating into Christian thought the immense learning and wisdom of Aristotle and his commentators."[201]

Aquinas

Aquinas tackled a number of legal issues in his *Summa Theologica*, by asking and answering a series of questions, numbered 90 through 108. We shall consider only those which are specifically relevant to our discussion of the quality of a ruler's rule, sovereignty and resulting actions.

Aquinas adds to our discussion by making the following relevant comments:

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[198] Anton C. Pegis, ed., *Basic Writings of Saint Thomas Aquinas*, vol. 1 (New York City, N.Y.: Random House Inc., 1945) at xxxv [Aquinas I].
[199] Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford, U.K.: Clarendon Press, 1988) at 15 [Wilson].
[200] Aquinas I, *supra* note 199 at xlviii – xlix.
[201] *Ibid.* at xxxix.

1. "the common good of the state cannot flourish, unless the citizens be virtuous, at least those whose business it is to govern";[202]
2. "[a] tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law";[203] and
3. "... every law is directed to the common welfare of man, ... but in so far as it fails of this common welfare, it is without binding power".[204]

In *Aquinas's Theory of Natural Law: An Analytic Reconstruction*, Lisska concludes that Aquinas "holds that arbitrary repressive laws are not, in fact or theory, laws at all."[205] That an unjust law is no law at all as it lacks law's foundation.

The concept of crimes against humanity "makes little sense without some foundation of basic human rights" which individuals have apart from that individual's membership in a nation state.[206]

Under his chapter entitled, Human Rights and Natural Law, Lisska discusses Aquinas's concept of duties. The duties arising from an analysis of human essence or nature, are those obligations which an individual has not only towards himself but also towards others.[207] Several of the duties which one has to oneself and others enable man to 'flourish', a contemporary translation of Aquinas's □*egis*□*hon*.[208] If flourishing is the end of human activity then preventing flourishing is to hinder the development of the human essence.[209]

LaCroix notes that Aquinas "argued that the political public good was supreme among human goods" and that the role of the prince was to promote the common

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[202] Anton C. Pegis, ed., *Basic Writings of Saint Thomas Aquinas*, vol. 2 (New York City, N.Y.: Random House Inc., 1945) at 759 [Aquinas II].
[203] *Ibid.* at 760.
[204] *Ibid.* at 798.
[205] Anthony J. Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford, U.K.: Clarendon Press, 1996) at 111 [Lisska].
[206] *Ibid.* at 112.
[207] *Ibid.* at 235.
[208] *Ibid.*
[209] *Ibid.*

good.[210] Although LaCroix was citing Aquinas in the context of "just war" theory, in the context of the thesis, this simply reinforces the conclusion that those who govern must be virtuous. That they must direct their efforts towards the common weal and that if the ruler turns to tyrannical rule, this is a perversion of law and as a result, illegal. The ruler then loses his legitimacy to rule over others.

Professor Lauterpacht reviews Aquinas and adds that the state is subject to that higher law which determines the relation of the individual to the state as he (Aquinas) was restating the idea "of a law superior to the external authority of the State."[211] According to Aquinas, a king who is unfaithful to his duty forfeits his claim to obedience, and it is not rebellion, for his own people to rebel against him as all political authority is derived from the king's people.[212] A critical component of not just the work of Aquinas but of natural law is the notion that a person possesses rights before entering organized society.[213]

To conclude this review of the impact of the law of the Middle Ages upon the thesis, the writer looks to medieval lawyers and their view that "[t]he King could do no wrong" because the law was a bridle on the King and his powers.[214] None the less, if the king did do wrong his subjects could rebel against him. In answer to the question - could another state lead, support or take an active part in that rebellion? – it is the writer's conclusion that as long as that other state or states believed in the principles of

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[210] W.L. LaCroix, *War and International Ethics: Tradition and Today* (Landam, Md.: University Press of America, 1988) at 257 [LaCroix].
[211] H. Lauterpacht, *International Law and Human Rights* (Camden, Conn.: Archon Books, 1968) at 84 [Lauterpacht].
[212] *Ibid.*
[213] *Ibid.* at 87.
[214] D.L. Keir and F.H. Lawson, eds., *Cases in Constitutional Law*, 2nd ed. (London, U.K.: Oxford University Press, 1933) at 32.

natural law as enunciated by Aquinas, they could. Other states would be justified in participating in a 'just war' or intervening because they would be defending the ultimate end of human existence – flourishing.

The Renaissance and the Rise of the Nation-State

From the late 1500s, the western world began to be shaped by two developments. These developments were the growth of sovereign nation-states and the development of a monopoly upon the use of violence by sovereigns within and without their nation-state.[215] Rigid or convenient adherence to these two principles over the course of history has lead the world to idly stood by and watch millions of people die.

Grotius

Hugo Grotius, or more correctly, Huigh de Groot, is often acknowledged as the father of international law. Modern international law looks to his various treatises for direction on many international law topics. His *Law of War and Peace* is fundamental to a discussion of the legal rights and duties of nations and the use of war to punish and redress violations of enunciated rights and the disregarding of duties.[216] In addition to reviewing the Grotian positions with respect to the use of humanitarian intervention we shall also briefly review the positions of two of his contemporaries, a theologian – Francisco Suarez and a secular jurist – Alberico Gentili.

Grotius's main treatise presented a version of the law of mankind which was binding not only upon dealings between sovereign states, but binding upon individuals in unorganized societies – pirates and outlaws.[217]

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[215] Wilson, *supra* note 199 at 15.
[216] Edward Dumbauld, *The Life and Legal Writings of Hugo Grotius* (Norman, O.K.: University of Oklahoma Press, 1969) at 31 [Dumbauld].
[217] *Ibid.* at 61.

In discussing war, he maintained that there is but one reason for going to war – injury. Specific examples of going to war could include: defence against an injury, recovery of what is legally due and excessive crimes committed by a wrongdoing state.[218] Grotius also dealt with the related topics of unjust causes of war (including preventative war when a nation is out to subjugate others), doubtful causes of war (when matters are balanced, peace is preferred), and the principle that even for a just cause, going to war should not be rushed into.[219] These aspects surface in twentieth century international law.

In Chapter 25 of *The Law of War and Peace* Grotius provides for the justification of waging war in the interests of others and for the sake of humanity or the rescuing of an oppressed people from manifest wrong by their ruler.[220]

A fundamental aspect of his position was that war could only be waged by a sovereign. No private or public person may lawfully wage war against a sovereign except when orders are given which are in violation of natural or divine law. This one point is problematic, as it is inconsistent with the other natural law rights of man, expounded by Grotius. This position appears to be based upon the assertion that to allow rebellion by a people against their ruler would be against the state's interest in public peace and order. Lauterpacht raises the Grotian conclusion that most evils would then seem to be preferable to civil strife.[221]

Some commentators suggest that this point (not rebelling against sovereigns) may have a practical origin. At the time of writing the *Law of War and Peace*, Grotius

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[218] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia, Penn.: University of Pennsylvania Press, 1996) at 43 [Murphy].
[219] Dumbauld, *supra* note 216 at 68.
[220] *Ibid.*
[221] Lauterpacht, *supra* note 211 at 116.

was living under the protection of the French king (having been exiled by the Dutch government).[222] None the less, Lauterpacht searches for another reason for Grotius's position on rebellion.

Lauterpacht concludes that although Grotius rejects civil strife or rebellion he does indicate that there was no duty to carry out orders contrary to natural law or to God's commandments. Lauterpacht then turns to an obscure passage of Grotius's treatise which states "that the right to make war may be conceded against him who has the chief authority among a free people."[223] Tied with this statement is the comment that, "[i]f such rulers transgress against the laws and the state, not only can they be resisted by force, but in case of necessity, they can be punished with death." Therefore, Lauterpacht concludes that the original Grotian statement (that there be no rebellion) would only apply in those situations where the people have unconditionally surrendered all their rights to an absolute monarch.[224]

To further buttress the thesis we look to the Grotian assertion that "war is not to be undertaken except for the enforcement of law" – natural law and that war is an "instrumentality of law". With these comments, he separates himself from previous writers who had stated that wars arising from disputes between kings and peoples were removed from law.[225]

At this point it is noteworthy that at the beginning of his text, Grotius lists a number of axioms underlying these later arguments. Amongst the nine rules which

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[222] Dumbauld, *supra* note 216 at 16.
[223] Lauterpacht, *supra* note 211 at 117.
[224] *Ibid.*
[225] *Ibid.* at 73.

define his thirteen laws, we find the following law – "(10) The government must in all things act for the good of the republic."[226]

Grotius argues that when a sovereign grossly violates the laws of nature, another sovereign may punish that sovereign.

> The fact must also be recognized that kings, and those who possess rights equal to those kings, have their right of demanding punishments … [for injuries that] excessively violate the law of nature or of nations in regard to any persons whatsoever.[227]

Grotius goes on and states that the higher authorities are "subject to no one", may administer punishment in order "for liberty to serve the interests of human society" and indicates that subjection to an international law and order, takes away the rights of individual sovereigns to have no one they are subject to.[228]

Meron makes two points in reviewing Grotius on the principle of non-intervention. The first is that non-intervention is "governed only when ' subjects are actually in the wrong [i.e. violated their duty towards their ruler], and … where the cause is doubtful'"[229] and the second is a reply to one of current objections to state intervention that occasional abuses do not render the right of intervention invalid:

> Hence, Seneca thinks that I may make war upon one who is not one of my people but oppresses his own, … a procedure that is often connected with the protection of innocent persons. We know, it is true, from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends; but a right does not at once cease to exist in case it is to some extend abused by evil men. Pirates, also sail the sea; arms are carried also by brigands.[230]

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[226] *Ibid.* at 36.
[227] Murphy, *supra* note 218 at 44.
[228] *Ibid.*
[229] Theodor Meron, "Common Rights of Mankind in Gentili, Grotius, and Suarez" (1991) 85 Am. J. Int'l L. 110 at 111 [Meron].
[230] *Ibid.* at 111-112.

Meron mirrors others in noting that Grotius wrote of the right to punish perpetrators of gross violations of human rights committed in another state. He further added that this is a precursor to the recognition of the jurisdictional right of universality over the gross violations of human rights such as genocide, war crimes and crimes against humanity.

Murphy draws one additional conclusion from the Grotian theories which assists us in pursuit of the thesis and this is the conclusion that the solidarity or potential solidarity of the states that make up international society goes beyond matters to which those states have consented.[231] From this premise Murphy states that "[t]his solidarity led Grotius to accept that a ruler has a responsibility not just for the safety and welfare of the ruler's subjects, but also for the safety and welfare of other subjects."

We conclude our review of Grotius with Lauterpacht's assertion that the idea of international humanitarian intervention originates with Grotius.[232] It originates from the principle that where a tyrant commits atrocities against his subjects "the exercise of the right vested in human society is not precluded."[233]

The concepts of community interest and humanitarian intervention also appear in the writings of two others of the late 1500s and early 1600s. These two writers were Francisco Suarez (1548-1617) and Alberico Gentili (1552-1608). Meron identifies Gentili, not Grotius, as the true progenitor of the right of humanitarian intervention.[234]

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[231] Murphy, *supra* note 218 at 45.
[232] Lauterpacht, *supra* note 211 at 119.
[233] *Ibid.*
[234] Meron, *supra* note 229 at 110.

Gentili

Gentili was an Italian Protestant who taught law at Oxford and published *Of an Honourable Reason for waging* (sic) *War* in 1598.[235] Several comments in this treatise bear on this paper's thesis including the waging of war, intervention and the punishment of rulers.

While considering honourable causes for making war, Gentili concluded "… if men clearly sin against the laws of nature and of mankind, I believe that any one whatsoever may check such men by force of arms."[236] The key factor is that the waging of war would take place "… for no private reason … but for the common interest and in behalf of others."[237]

Another modern application of Gentili's ideas is as part of the discussion on the present-day distinctions between state interests and general humanitarian causes.[238] Gentili dealt with this distinction by noting that "a foreigner may not conduct a case relating to a road and highway of the state, …[but that] he may do so in a question affecting a man's liberty."[239]

Gentili also severed the connection between war and religion and wrote that war is lawful only against "idolators" if the idolatry is "joined with the slaughter of innocent victims; for the innocent must be protected."[240]

As a result, wars to protect individuals were justified and Gentili used the analogy of waging war on pirates because, "even though those peoples had touched

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[235] *Ibid.* at 113.
[236] *Ibid.* at 114.
[237] *Ibid.*
[238] *Ibid.*
[239] *Ibid.*
[240] *Ibid.*

nothing belonging to the Romans, to their allies, or to any one connected with them; … they had violated the common law of nations."[241] He added:

> And if a war against pirates justly calls all men to bear arms
> because of love for our neighbour and the desire to live in peace,
> so also do the general violation of the common law of humanity
> and a wrong done to mankind.[242]

To directly deal with intervention in another state Gentili stated that the subjects of other states placed those people within the cocoon of the "kinship of nature and the society formed by the whole world" concluding that if you abolish that society we "destroy the union of the human race."[243]

In dealing with the issue of punishment of sovereigns, Gentili added that there must be someone "to remind them of their duty and hold them in restraint."[244] The 'no one superior' argument used by rulers to justify their actions, does not stand up to his scrutiny. He looks to Seneca for the comment that if another ruler "remote from my nation harasses his own,…the duty which I owe to the human race is prior and superior to that which I owe that sovereign."[245] Gentili further reminds rulers that a good ruler will remember that "kings are made for their kingdoms" and not the reverse and should a sovereign become angry he will want to have someone there to remind him not to take out his anger on his subjects.

In concluding this review of Gentili we note that some of the most basic principles of natural law surface. His answer to the question – should one aid subjects

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[241] *Ibid.*
[242] *Ibid.*
[243] *Ibid.* at 115.
[244] *Ibid.*
[245] *Ibid.*

'even when they are unjust?' is that intervention is justified even if those who you are aiding have "sinned" as it is "part of humanity to do good."[246]

Suarez

Francisco Suarez is the third of our Renaissance triumvirate. This Spanish Jesuit scholar was author of two major works, the second of which, *The Three Theological Virtues, Faith, Hope, and Charity* is relevant to this thesis.

He also analyzed causes for waging war although his viewpoint appears to be more limiting than the previous two Renaissance writers.

After analyzing Suarez, Meron draws the following conclusions to justify war:

1. when one prince denies another the common rights of nations such as right of highway passage or violations of "trading in common" without reasonable cause;
2. to assist a friend when the friend (another nation) consents either expressly or implicitly to that assistance. The friend has to first justify his own war; by
3. showing that he has suffered some injury. The injury cannot be addressed by a friend if the injured party does not want to remedy the injury himself. Suarez reasons that allowing kings to avenge injury in any part of the world would confuse the orderly distinctions of jurisdiction.[247]

By Suarez's reasoning, one additional situation allowed for war and state intervention without invitation. This situation was when "the prince forcibly compelled his presumably Christian subjects to practice idolatry"[248]

Meron stated that it was not clear if Suarez believed it permissible for an uninvolved state to wage war in order to uphold "the common rights of nations", however, if these common rights appear to be rights related to commercial activity

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[246] *Ibid.*
[247] *Ibid.* at 113
[248] *Ibid.*

versus rights of liberty and flourishment, then this writer's response would be to respond in the negative. This particular position is supported by Meron's own conclusion that Suarez felt that abuse would result if one leaves humanitarian intervention open-ended and would allow war to be waged "on the ground of protecting innocent little children."[249]

Post-Westphalian Thought

The Treaty of Westphalia is significant in that the attributes of the modern system of statehood and international law arose from its negotiations, terms and influences.[250] Since the date of this treaty, history has seen significant developments in all aspects of the human endeavour including continuing development of legal thought on the issue of statehood and obligations. We begin our review of this period with Austin.

John Austin

This review of John Austin's comments on international law is based upon an expanded version of his lectures as a professor of jurisprudence at the University of London between 1828 and 1832.[251] There are two points that are particularly relevant to international law. The first is Austin's questioning of international law as law and the second is his discussion of the sovereign's proper absolute end. We shall only consider the second as it is particularly relevant to our exploration of a sovereign's responsibility and obligation to his people to answer the question of twenty-first century intervention.

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[249] *Ibid.*
[250] Slomanson, *supra* note 177 at 39 and 179 and Starke's, *supra* note 96 at 11.
[251] Austin, supra note 165 at viii.

Early in his lectures, Austin compared international law to "the law of honour" or "the law of fashion" in the sense that the law of nations was like the other two – "… rules set and enforced by *mere opinion* … held by an indeterminate body of men in regard to human conduct."[252] Put another way – international law is "… but a code of rules of conduct of moral force only."[253]

Austin's opinion with respect to international law flows from his definition of law. He defines laws as a "species of *commands*"[254] and that laws flow from a determinate source.[255] He goes on and states that, as there is no set body to make international law, no one to interpret and develop it or to resolve disputes about it, states may disobey these rules when it is in their interest to do so. (We will see this again during our discussion of Brownlie.) Austin goes on to add that war or other such deed may result when, "in *consequence* of that displeasure, it is likely that *some* party (*what* party being undetermined) will visit the party provoking it with some evil or other."

Commentators such as Murphy have written that Austin gave form to realist theorists who have criticized international law and its ineffectiveness largely based upon Austin's "lack of enforcing sanctions" characteristic of international law.[256]

What is more particularly relevant to the thesis is Austin's statements with respect to the "proper purpose or end of a sovereign political government."[257] Law's purpose is to "advance as far as is possible the weal or good of mankind"[258] and he does not limit this common happiness to just the people of that sovereign – "its own

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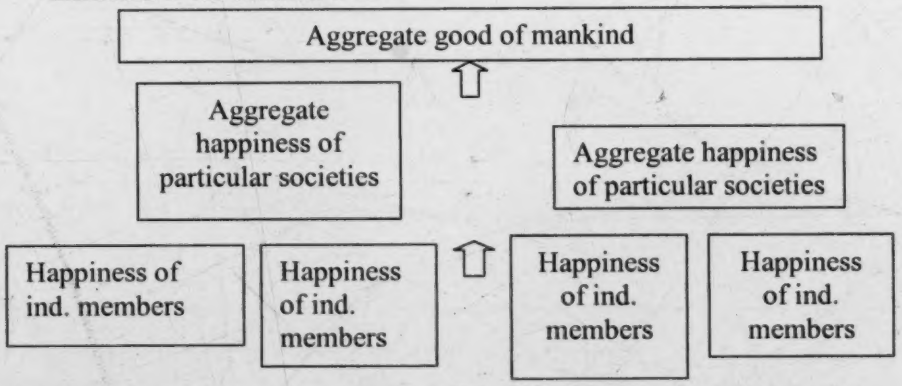
[252] *Ibid.* at 12.
[253] Starke's, *supra* note 96 at 16
[254] Austin, *supra* note 165 at 26.
[255] Damrosch - Materials, *supra* note 175 at 16.
[256] Murphy, *supra* note 218 at 21.
[257] Austin, *supra* note 165 at 295.

particular community" but, extends this responsibility to the "universal community of mankind."[259]

An equation could be developed from Austin's thoughts in the sense that the happiness of different individuals eventually leads to the aggregate good of mankind as illustrated in the following Illustration.

Illustration 1: The Common Weal


Aggregate good of mankind
Aggregate happiness of particular societies
Aggregate happiness of particular societies
Happiness of ind. members
Happiness of ind. members
Happiness of ind. members
Happiness of ind. members

To accomplish its end, government must accomplish ends that are subservient to the absolute end. Austin adds that it is not the end of government to confer and preserve rights from infringement (as these rights could lead to misery and not happiness) but to confer *beneficent* rights that a government should protect but only as an "instrumental end" to accomplish the absolute purpose.[260]

Austin further adds to the debate as to the origin of the sovereign's power when he states that it "flows from the people", that people's consent is the origin of every government as every government arises through this consent.[261] He continues suggesting that should a people not rise up against a government or "they consent to its

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[258] *Ibid.*
[259] *Ibid.*
[260] *Ibid.* at 297.
[261] *Ibid.* at 302.

continuance" it is because they fear the alternative – violent revolution.[262] "They consent to what they abhor, because they avoid thereby what they abhor more."[263]

Austin also comments on the monarch's duty to his subjects by indicating that "the monarch lies under duties towards his subjects" and that these duties are partly religious and partly moral, however, there are no legal duties because then it (the monarch) would be a subordinate government."[264]

Professor Dworkin, in reviewing, Austin and H.L.A. Hart, indicates that Hart rejected Austin's "brute fact of habitual command and obedience" account of legal authority and introduced a different basis of law.[265] None the less, Austin's comment with respect to duty and obligation is particularly relevant to the thesis and adds a link in the chain of developing thoughts on duties and obligation between sovereign and their subjects. The question that remains – what is to be done if a government is not advancing the weal of its citizens and community?

Based on the examination of Austin it can be concluded that that government must be replaced – for if:

1. the government no longer advances the weal of its citizens, it then negatively impacts not only upon the happiness of the community over which it rules but also on the happiness of mankind – an international impact;
2. happiness no longer becomes the absolute end of the ruler and he then loses the consent of the people;
3. the peoples no longer consent and are prepared to accept what Austin says what they adhor – violent revolution; and
4. the peoples abhor violence against them (such as the situation in Rwanda),

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[262] *Ibid.* at 303.
[263] *Ibid.*
[264] *Ibid.* at 307.
[265] Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, (Oxford, U.K.: Clarendon Press, 1987) at 11 [Gavison].

then, a government can easily become neither *de jure* nor *de facto* and becomes a "government supplanted or displaced, and not deemed lawful."[266] A clear alternative to Austin's "violent revolution" is intervention by others for without a government whose ultimate end is not the happiness of its peoples then this unhappy end breaks down the happiness of mankind.

H.L.A. Hart

As indicated earlier, Hart disagreed with Austin in a number of ways.

Hart begins by examining the question of whether international law is binding. Being bound by a law includes two elements: that the rule is valid and that a person under this law has some obligation or duty.[267] As part of this review, Hart rejects Austin's requirement that obligations must be within a body of organized sanctions.[268] He does this by setting out the significant difference between municipal law and international law – between the regulating of individuals and of states. Hart writes that there is a greater likelihood that individuals who do not "voluntarily submit to the restraints of law" will break the law and that the imposition of sanctions is a requirement to protect those who voluntarily submit to the law.[269] Hart adds "there is neither a similar necessity for sanctions … nor a similar prospect of their sage and efficacious use"[270] in international law. The reason for this is that aggression between individuals under municipal is often limited to the aggressor and victim whereas aggression on the world stage is public, and even for the strongest state there is too

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[266] Austin, *supra* note 165 at 345-346.
[267] *Ibid.* at 216.
[268] *Ibid.* at 218.
[269] *Ibid.* at 218-219.
[270] *Ibid.*

much to risk from situations which are rarely predictable.[271] Hart then lists the obligations which are characteristic of international law including: pressure to conform, breaches of rules lead to reprisals and counter-measures, and that nations may be unwilling to fight over issues of less concern than others.[272]

Having confirmed that international law is law, Hart goes on to reconcile state sovereignty with the principle of states being bound by international law.

Hart first moves to set aside the notion of identification of state and monarch and refers to two defining facts that bring the concept of state within the law. These facts are firstly, that people live in a territory with a legal system characterized by the three branches of government and primary rules and secondly, "that the government enjoys a vaguely defined degree of independence."[273] After reviewing different forms of dependence and independence Hart defines a sovereign state as "...one *not* subject to certain types of control, and its sovereignty is that area of conduct in which it is autonomous." He rejects contentions that sovereignty must be unlimited by saying that this would be unreasoned dogma and adds that he can only know the extent of a nations sovereignty by knowing "what the rules are."[274]

Hart also rejects the voluntarist position of international law (that states are only bound by self-imposed international laws) for three reasons. The first is that these theories fail to explain how it is known that states can be bound by laws, secondly, that there is incoherency in the argument that states are sovereign and therefore can agree to

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[271] *Ibid.*
[272] *Ibid.* at 220.
[273] *Ibid.* at 221.
[274] *Ibid.* at 223.

be bound by the international laws they select, and thirdly, Hart points to the facts – that the system in place is the system and that it works as nations comply with it.[275]

Others suggest that if the formal difference between international and municipal law remains, then the only way to classify international rules is by stating that they are moral rules, especially if there are no Austinian sanction-process. Hart rejects the suggestion that the basis for international law is morality suggesting that this would be a very crude classification.[276]

Hart then lists the reasons for resisting the cloaking of international law within morality. Nations often cite other nations through the suggestion that certain conduct was immoral when what they truly mean is to cite them in contempt of some international rule or obligation.[277] Hart suggests a stronger reason. Both municipal and international laws are often morally indifferent, existing for convenience or necessity – rules that appear arbitrary and may be highly specific for no better reason than someone made a decision that it be so.[278] In the municipal setting, e.g. the number of witnesses needed to execute a will or in international law, e.g. the width of territorial water. Both have no moral basis although there are laws that are based in morality – the point being that legal rules can deal with detail while moral rules cannot.[279]

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[275] *Ibid.* at 224.
[276] *Ibid.* at 227.
[277] *Ibid.* at 208. This was the dilemma faced by the Americans and the world during the Rwanda genocide. To call the killings genocide would have forced nations to face up to their obligations agreed to in the Genocide Convention and coming on the heels of the loss of soldiers in Somalia just a few months before the US hesitated becoming involved in a situation with little strategic interest.
[278] *Ibid.* at 229.
[279] *Ibid.* at 230.

A third aspect of the morality discussion is the fact that morality does not have a legislature. To even consider this, is "repugnant to the idea of morality" – that we can legislate morality.[280]

Hart rejects the position that states comply with obligations for moral reasons. This position is taken despite Hart's recognition that states express themselves as having complied with this law or that law for a moral reason.[281]

Hart shows little tolerance of continuing this discussion and states that isn't it enough "proof that binding rules in any society exist, [and that it] is simply that they are thought of, spoken of, and function as such."[282] Hart ends this discussion with the consideration that both people and states, in their respective forums, comply with rules for many and diverse reasons including but not limited to long-term interest, a wish to continue tradition or disinterested concern.[283]

Hart's analysis of international law is effective for a number of points it raises.

The first critical point is Hart's assertion that a state's sovereignty is not unlimited – it is sovereign only over those matters in which it has autonomy. By their action, nations have either signed away their autonomy or have chosen to comply with other international law. In this regard, Hart's comments dovetail with some of the leading international law commentators such as Henkin.

The next critical point is Hart's position that morality does not guide international law. With the significant expansion of the number of states over the last 50 years, if morality were the foundation for international law the question would arise

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[280] *Ibid.*
[281] *Ibid.* at 231.
[282] *Ibid.*
[283] *Ibid.* 232.

whose morality would apply. With so many different religions, philosophies, traditions, and belief systems it would become very difficult to lay the necessary moral groundwork for any international agreement or rule.

John Rawls

On February 12, 1993, John Rawls unveiled a different approach to the principles and norms of international law and practice. This approach he called the "Law of Peoples".[284] Two main ideas lead to the Law of Peoples. The first is that the great evils of human history (unjust wars, oppression and mass murder) are a result of political injustice. The second idea is that these evils will disappear by "following just (or at least decent) social policies and establishing just, basic institutions."[285]

The intent here is not to explain Rawls entire theory, but to look to illustrations of his thought when dealing with state sovereignty and intervention.

In developing his ideas, Rawls lists and reflects upon some of the traditional principles of international law or as he refers to them "principles of justice" which include the requirement for peoples to observe treaties, observe the duty of non-intervention, and the requirement to honour human rights.[286] These three principles along with five others "constitute the charter of the Law of Peoples" some of which require qualification.[287]

In reviewing his charter principle of honouring human rights, Rawls states that human rights play a special role and as a result, "…they specify limits to a regime's

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[284] John Rawls, *The Law Of Peoples with The Idea of Public Reason Revisited* (Cambridge, Mass.: Harvard University Press, 1999) [Rawls].
[285] *Ibid.* at 6-7.
[286] *Ibid.* at 37.
[287] *Ibid.*

internal autonomy."[288] He goes on to restrict the use of war as an instrument of policy to reasons already referred to in the United Nations Charter and customary international law including "…grave cases of intervention to protect human rights."[289] His argument for using war to protect human rights is based on his elevation of these rights above other rights belonging to certain kinds of political institutions because they set the "necessary …standard for the decency of domestic political and social institutions." He also argues that they are "universal rights" and have a political and/or moral effect even if they are not supported locally – a critical point as they are "intrinsic to the Law of Peoples."[290]

Outlaw states are taken to task for violating human rights thereby providing the grounds for intervention in their affairs.[291] The Law of Peoples does not follow any moral, theological or philosophical basis for human rights, as these rights are "a proper subset of the rights possessed by citizens in a liberal constitutional democratic regime" and these peoples will simply not tolerate outlaw states.[292]

Rawls deals with outlaw states by branding them aggressive and dangerous and they should be forced to change, otherwise, "they deeply affect the international climate of power and violence.[293] As to how to institute change, Rawls draws on much of the current international law literature and suggests three steps.

The first step is to put in place a "confederative center (sic)" which would allow all to express themselves and to possibly shame the outlaw states into change. He backs

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[288] *Ibid.* at 79.
[289] *Ibid.*
[290] *Ibid.* at 80
[291] *Ibid.*
[292] *Ibid.* at 81.
[293] *Ibid.*

this process with the second step of economic and other sanctions against the outlaw states. Recognizing that sanctions may fail, the third step is intervention.

In completing our short review of John Rawls' *The Law of Peoples* we need to examine two additional points. The first is the factual evidence of how outlaw states deal with their people and why intervention is justified. Here Rawls refers to a study of several world famines where food decline was not the cause of the famine. The main problem was that the governments failed to distribute the food that was available – the governments simply let their people starve, which is a violation of human rights.[294]

The second additional point of note for the purposes of the thesis is the explanation Rawls provides for his difference with natural law.

He begins the comparison by stating that the objective is universal peace among nations, which both natural law and his proposal say is possible. The essential difference between the two lies in how they are conceived.[295] Natural law is part of the law of God but is based upon reason whereas the Law of Peoples "…falls within the domain of the political as a political conception."[296] Both views support self-defence as part of just war theory. Rawls' self-defence includes intervention by peoples to protect the umbrella of his ideas – political injustice, human rights.

Despite significant differences, John Rawls and last of the legal theorists we will review share similarities on matters touching international law. Some suggest that there is now an overlap between some of the views held by Rawls and Michael Walzer.[297] These similarities include: tolerating international differences amongst non-aggressive

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[294] *Ibid.* at 109.
[295] *Ibid.* at 103-104.
[296] *Ibid.* at 104.
[297] Brian Orend, *Michael Walzer on War and Justice* (Montreal, QC: McGill-Queen's University Press, 2000) at 177 [Orend].

nations, the increasing role human rights play in global justice, and a prominent place for nation-states within "just international ordering".[298]

Michael Walzer

Despite the similarities, the two differ on other matters – Rawls is more supportive of international institutions such as the United Nations (his confederative centre) which enthusiasm Walzer does not match. Rawls' view of a "realistic utopia" also differs from Walzer's position.

None the less, similarities continue in the area of the principles of justice for the international community and include: the equal sovereignty of peoples, non-intervention in states with other "well-ordered, sovereign peoples", international self-defense only, and if attacked compliance with proportionality of response – just war.[299]

One of the most significant differences between them is Walzer's inclination to view international justice "more as the product of a real-world political consensus between peoples than as the legislative mandate of public reason itself."[300] Walzer looks at international justice as adherence to standard principles of conduct "we all just happen to agree on".[301]

How do these differences appear when we look at Walzer's position on intervention?

We start by noting that in Walzer's opinion, the only just cause of war is resisting aggression.[302] Aggression is defined as "every violation of the territorial

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[298] *Ibid.*
[299] *Ibid.*
[300] *Ibid.* at 178.
[301] *Ibid.*
[302] *Ibid.* at 88.

integrity and political sovereignty of an independent state."[303] This is almost a word-for-word United Nations Charter definition.[304]

The next step with respect to intervention, is taken by examining Walzer's answer to explain that state rights are "ultimately derived" from individual human rights. The response is twofold, the first being "that individual human rights cannot, in our world, be realized outside a secure social context, like that which the state can offer."[305] The second response is somewhat more complex in that it relies upon a social contract that Walzer defines as "an agreement to reach decisions together about what goods are necessary to our common life, and then to provide those goods for one another."[306] Orend explains this by concluding that people have always banded together for protection and the enjoyment of goods that people could otherwise not enjoy if they were not surrounded by state protection.

Crucial to this argument is that "the moral standing of a state is *contingent upon* its protection of it members, both individually and collectively."[307] If the state does not meet this test it may lose its legitimacy for one or both of two reasons. Firstly, if there are ethnic divisions causing disunity within a state or secondly, a state "in which a government turns against its own people and engages in terrible human rights violations" – massacre or enslavement, then the state has violated the "thin and

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[303] *Ibid.*
[304] Bruno Simma *et al.* eds., *The Charter of the United Nations: A Commentary* (Oxford, U.K.: Oxford University Press, 1994) at 106 [Simma - Charter].
[305] Orend, *supra* note 297 at 91.
[306] *Ibid.*
[307] *Ibid.*

universal moral code contained within all thick moralities"[308] and loses not only legitimacy but the veneer of entitlement of non-interference.

Walzer further develops this discussion on intervention within a humanitarian context. He adds that intervention is acceptable if designed to rescue citizens of a state "from acts that shock the moral conscience of mankind"[309] – massive and terrible violations of human rights. Here Walzer differs from some of his critics who suggest that foreign intervention is permissible to prevent the violation of human rights even for violations which are less serious that those which Walzer enunciates.

Have not these states also lost their legitimacy even though they have not committed the extreme violations referred to by Walzer?

The answer is found in Walzer's belief in the minimalist or thin conception of human rights focusing upon the most egregious violations of murder, torture and enslavement.[310] The reason for this viewpoint is that Walzer's belief in political communities stems from the banding together principle where, through self-help, peoples can change their government. As a result, only in the most extreme situations will a people not be able to make changes through self-help and this is when foreign-armed intervention is obligatory.[311] Foreign-armed intervention is also acceptable in a secessionist struggle or civil war however, it is not obligatory, just permissible.[312]

Walzer further answers his critics by adding that humanitarian intervention is not just for the most extreme situations. He does rule out war in situations which do not meet the higher bar of human rights violations. Therefore, intervention is available in

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[308] *Ibid.* at 92.
[309] *Ibid.* at 106.
[310] *Ibid.*
[311] *Ibid.* at 106-107.
[312] *Ibid.* at 107.

those situations through vehicles such as diplomatic protest, non-cooperation, and censure.[313] This escalation response is another similarity with Rawls' views. The unleashing of international armed force for humanitarian purposes "is grounded only in those very rare cases where there is no hope of self-determination, when commonplace callousness by a government has been replaced by a 'savage turn' on its people, resulting in massacre or enslavement."[314]

The Brownlie-Lillich Debate

This debate between Professors Ian Brownlie and Richard B. Lillich begins with Brownlie's thoughts expressed in his *International Law and the Use of Force by States*, originally published in 1963. Lillich responded via two articles in the late 1960s.[315] This debate continued in *Law and Civil War in the Modern World* and was revisited by Brownlie in February 2001 during a lecture given to the Institute of Graduate Studies in Geneva.[316]

Brownlie is opposed to humanitarian intervention as it violates the sanctity of state sovereignty while Lillich argues in support of humanitarian intervention.

During his revisiting of his original text on this subject, Brownlie reviews several assumptions and sensitivities to maintain his position 40 years after his original position and in the face of intervening world events. His continued denial of a legal basis for humanitarian intervention is based upon several shortcomings, some more major than others.

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[313] *Ibid.* at 108.
[314] *Ibid.*
[315] See Richard B. Lillich, "Forcible Self-help by States to Protect Human Rights" (1967-1968) 53 Iowa L. Rev. 325 [Lillich I] and " Intervention to Protect Human Rights" (1969) 15 McGill L.J. 205 [Lillich II].
[316] Brownlie, *supra* note 191.

There are a number of fatal flaws in his article require his return to the inkwell. These flaws include: his seeming reliance upon policy requirements, what this writer believes is his incomplete analysis of customary international law and □*egis*□*h juris* (not even meeting his own test)[317] and finally his mixing of several factors which have been used by various nations to justify their particular intervention in another state,

Brownlie spends a disproportionate amount of time in his paper considering what officials of the British government said with respect to the 1999 bombing campaign by NATO against the Former Republic of Yugoslavia. Here he looks to a magic word or phrase to come from various government leaders in Great Britain hoping that they would explain their legal basis for the intervention. He finds none and then quotes a House of Commons committee report which states that "humanitarian intervention has a tenuous basis in current customary international law".[318]

Professor Brownlie relies upon this statement to buttress his position and yet he is the source of this particular House of Commons Committee viewpoint. To emphasize the source of the Commons Committee's opinion, I quote from Lillich's review of Brownlie's position in 1967 where Lillich states, "Brownlie, who thinks that 'any legal basis of the right of intervention is now extremely tenuous '…"[319]

By acknowledging that there have been significant changes to the political structure in the world and concluding that "…these changes have not had any particular effects on the law"[320] Brownlie shows his reliance upon policy and not legal reasons for his position. He immediately gives the reason for this conclusion being that state

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[317] Slomanson, *supra* note 177 at 14.
[318] Brownlie, *supra* note 191 at 35.
[319] Lillich I, *supra* note 315 at 346.
[320] *Ibid.* at 21.

interests have remained the same and that evidence indicates that the majority of states have a conservative view of the law.

The evidence which he cites to support his statement includes statements made at the Group of 77 meeting held in 1999 where the Foreign Ministers' communiqué stated that "[t]hey rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law."[321]

Brownlie then goes on to argue that there has been no change to customary international law. And yet his argument is based on a □egis□ho foundation. The impression that Brownlie leaves is that he ignores his own test of what defines customary international law. As referred to by Slomanson, the Brownlie test includes:

1. duration or passage of time;
2. substantial uniformity or consistency of usage by the affected nations;
3. generality of practice, or degree of abstention; and
4. *opinion juris et necessitatis* – international consensus about, and recognition of, the particular custom as binding[322]

He appears to ignore the action requirement, relying, instead, on what people have said.

Searching for a customary international law justification for humanitarian intervention, Brownlie reviews the events from the time of the signing of the 1928 Kellogg-Briand Pact (where nations agreed not to use war to settle disputes but look to pacific means) until and including the signing of the UN Charter. He finds no such justification. He then looks to the more current situations and again, finds none. In this writer's opinion, Prof. Brownlie misused the litmus test which even he has cited as a

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[321] *Ibid.* While at the same time many of these same governments have interpreted the UN Charter in means which did not seem possible, i.e. provisions for peacekeeping.
[322] Slomanson, *supra* note 177 at 14.

requirement – usage. As Kelsen indicates, "in practice it appears that *opinion juris* is commonly inferred from the constancy and uniformity of state conduct. But to the extent that it is so inferred, it is this conduct and not the state of mind that is decisive."[323] History has shown that whatever was said and written during the Kellogg-Briand Pact process certainly has not been adhered considering the many wars fought since 1928, including World War II, which many commentators cite as a humanitarian intervention.

There is also disagreement with Brownlie's interpretation of the development of customary international law in the 1800s and early 1900s. He states that humanitarian intervention had not been positively accepted into customary international law and yet other commentators including Ocran differ. Ocran, conservatively states that from the 1860s onwards, legal scholars seemed receptive to the validity of humanitarian intervention by individual and/or groups of states and that prior to World War I, the majority of writers had "apparently accepted the legality of humanitarian intervention."[324]

Brownlie also mixes a number of self-defence principles and examples to further justify his objection to humanitarian intervention. There are a number of exceptions to the non-intervention principles including: self-defence, collective intervention pursuant to the UN Charter, and to protect nationals abroad.[325] With due respect to Prof. Brownlie, it is this writer's opinion that examples such as the American use of force

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[323] Damrosch - Materials, *supra* note 175 at 95.
[324] T. Modibo Ocran, "The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping" (2002) 25 B.C. Int'l & Comp. L. Rev. 1. at 57.
[325] Starke's, *supra* note 96 at 95.

against Panama in 1989 are not good examples in dealing with anything related to the topic of humanitarian intervention.

To place Prof. Brownlie's position in perspective, we turn to Teson.[326] It appears that Brownlie is selective about which state actions fit within his criteria for customary international law by stating that, "[t]he truth is that one cannot treat all state conduct as practice" suggesting that examples of humanitarian intervention do not qualify as state practice.[327] This then begs the question – who decides what is state practice? Although Brownlie is prepared to accept humanitarian intervention when there is a threat to peace,[328] he believes, that generally, humanitarian intervention has a high price to pay in human terms and that more people will be saved through non-intervention.[329] This element of Brownlie could be understood considering the fact that the tragedies to which the 1990s have been witness are some thirty years away, and yet, Brownlie seems to disregard the 1800s interventions such as on behalf of the Greeks in 1827 and later the Armenians and other Christians against Turkey following a number of massacres,[330] on behalf of Maronite Christians in Syria during 1860-61 (France authorized by several European countries), and Bosnia and Bulgaria in 1877-1878 – again involving the Turkish mistreatment of Christians.[331]

In dealing with Brownlie's continued position with respect to the UN Charter not authorizing intervention any more than customary international law, Teson explains

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[326] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., (Irvington-on-Hudson, N.Y.: Transnational Publishers, Inc., 1997) [Teson].
[327] *Ibid.* at 12.
[328] *Ibid.* at 152.
[329] *Ibid.* at 109.
[330] Lauterpacht, *supra* note 211 at 120.
[331] David J. Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention" (1992) 23 U. Tol. L. Rev. 253 at note 4.

this by stating that Brownlie is a leading Charter literalist[332] standing against those who argue that organic treaties such as the UN Charter, "should be interpreted in accordance with present purposes and expectations in the international community."[333]

Turning to Professor Lillich, we note that he begins outlining his position by dealing with the issue of national self-help to protect their formal rights by first reviewing the issue of the protection of nationals. He explains the customary international law in this area and quickly sets this issue aside to deal more significantly with humanitarian intervention.

He then begins his justification for humanitarian intervention with the statement that "[i]nternational law traditionally permitted the use of forces as the ultimate sanction in two main human rights situations: the protection of nationals abroad and humanitarian intervention."[334]

Lillich argues that the doctrine of humanitarian intervention was developed by the 'great powers' of the world during the nineteenth century with the primary purpose of "the protection of individuals and groups of individuals against their own state."[335] He explains this doctrine further by looking to Prof. Lauterpacht and adding that this principle is used "in cases in which a State maltreats it subjects in a manner which shocks the conscience of mankind."[336]

Lillich agrees that there are some problems in attempting to justify humanitarian intervention on "theoretical grounds under customary international law", however, he agrees with other writers when they say that the right of independence (absolute state

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[332] Teson, *supra* note 326 at 220.
[333] *Ibid.* at 154.
[334] Lillich I, *supra* note 315 at 336.
[335] *Ibid.* at 332.
[336] *Ibid.*

sovereignty) gives way when it is abused.[337] In international law there are no perfect rights, no absolute rights.[338]

Lillich concludes his remarks on customary international law by adding that the doctrine of humanitarian intervention is "so clearly established … that most criticism was directed towards the fact that this right to use forcible self-help was not exercised often enough." Lillich draws this conclusion a little too quickly without showing the steady progression of intervention through the steps required by to Brownlie.

Lillich reviews the UN Charter and its implication for humanitarian intervention and makes two comments based upon provisions in the UN Charter. The first is that article 2(7) grants the UN authority to intervene and the second point is that he expected that the interdependency of the protection of human rights and the issue of world-wide peace and security will erode the provision of domestic jurisdiction when these provisions in the UN Charter come into conflict.[339]

Lillich also cites Professor Jessup's comment about "… the inability of the international organization to act with the speed requisite to preserve life" allowing the possibility of legitimacy of unilateral state intervention. To justify that action Lillich states that Jessup "… recognized that the old doctrines were not necessarily absolute dead-letter."[340] If a renowned writer on international law was prepared to look at unilateral state intervention as justified (a previously condemned action) then clearly the other seemingly absolutes are ready to fall.

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[337] *Ibid.* at 333.
[338] *Ibid.*
[339] *Ibid.* at 338.
[340] *Ibid.* at 335.

Lillich's concluding remarks reject Brownlie's non-interventionist approach. "Surely to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of forces is to stress blackletter at the expense of far more fundamental values."[341] We also note that Lillich was concerned about unilateral state action and as part of his thesis developed a set of standards to be used within the humanitarian context. The criteria also considered what was labelled as forcible self-help within this unilateral context. As a result, the writer believes Lillich limited himself unnecessarily by having to look to the laws of armed conflict (his proportionality element) and having to explain away some negative aspect of unilateral action in the past, such as self-interest, as opposed to being able to look directly at humanitarian intervention by itself and not as an adjunct to other international law.

Conclusion

Common throughout this literature is the message that if you are a ruler you have duties and obligations to your peoples.

Bracton stated this as a reference to the king complying with the same rules he laid out for his peoples and that he should be restrained in his behaviour towards others.

Aquinas puts this in terms that a ruler is responsible for his people flourishing – the ultimate end of human activity. Rebellion by a ruler's peoples is the end which awaits a king who is unfaithful to this duty.

During the Renaissance, we saw the rise of nation-states and with it a refinement of the meaning of sovereignty and the duties rulers have to their people. Grotius

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[341] *Ibid.* at 344.

emphasized that the government must do good acts for the republic and that if the ruler was a perpetrator of gross violations of human rights the ruler could be punished even by other states. One commentator added that this universal responsibility was recognized by Grotius thereby allowing intervention in the affairs of another state. Gentili was of much the same view while Suarez was somewhat more cautious, looking for state consent prior to intervention.

Since the rise of the nation state we see a similar line of legal justification for intervention. Each of the four theorists which have been included in this survey write of duties and obligations owed from the ruler/government to its peoples.

Austin discusses the "proper purpose" of a government as being to advance the good of mankind – in the sense of not only being responsible for the happiness of your own people but also a responsibility to the "universal community of mankind." Sovereignty is not supreme.

Although Hart disagrees with Austin in a number of areas, Hart also believes that sovereignty is not unlimited and rejects the requirement of state consent for international law to be binding upon that state.

Rawls introduces these ideas under a different scheme, based upon justice and right. Based upon these rights, people have certain expectations and he elevates human rights above other rights belonging to states. Rawls also tackles the issue of humanitarian intervention by saying that war can be used to stop grave violations of human rights. Outlaw states can be taken to task, even through war, to stop their aggression, however, other means must be attempted first before using armed force.

Walzer appears to take a cautious approach to intervention in another state's affairs. He agrees that state rights are derived from individual human rights and implicit within this idea is that it is the responsibility of the state to offer a secure environment in which individual members of that state can exercise those individual rights. If a state does not protect those rights, for example when it participates in "terrible" violations of human right, it loses its legitimacy and its entitlement to non-interference by others. Walzer agrees with Rawls in the use of escalation of intervention from diplomacy through to sanctions, but prior to war. Walzer sets the highest standard for intervention – the most terrible of violations.

One concern that this writer has with respect to the ideas on state intervention is the intertwining by most if not all of these writers of the ideas of humanitarian intervention and the issue of territorial integrity or political independence and the second intertwining of humanitarian intervention and war. Most historical examples show that this is not necessarily the case. Most interventions have been of relatively short duration with the purpose of attempting to stabilize the situation in another state. By bringing the territorial integrity and war issues into the mix, these writers over complicate the issue of humanitarian intervention whose purpose is not to integrate that territory into the interfering state's territory but to stabilize matters in order that the people can make decisions about their ruler and pursue the common happiness of mankind.

2.3 – Interpreting "Matters Essentially Within Domestic Jurisdiction"

In September 2000, during his presentation to the fourth joint Singapore Ministry of Defence and Society of International Law (Singapore) Seminar, Professor

Peter Malanczuk stated that the doctrine of humanitarian intervention is controversial and that the majority of American and European literature does not support the existence of this doctrine.[342] After reviewing the doctrines of *erga omnes* and necessity and the mechanism of the Uniting for Peace Resolution, he concluded that there still remain outstanding issues in this area of international law.

At the same seminar, Professor Thomas M. Franck considered a number of different approaches which the United Nations (UN) has taken with respect to adapting to developments which had previously made the UN unworkable. The balancing of sovereignty and the protection of fundamental human rights focusing on Paragraph 2(7) of the UN Charter was one of the developments discussed by Professor Franck.[343]

Paragraph 2(7) of the UN Charter reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.[344]

As noted by Professor Franck, this paragraph "makes no exceptions for instances of a state's gross violations of human rights, racism, apartheid, … mass starvation of its population…"[345] He notes that the "Charter has gradually adapted to permit the political organs of the UN to intervene, with force when necessary, in a very

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[342] Peter Malanczuk, "Use of Force and Law of Armed Conflict Issues before the International Court of Justice" (Paper presented to the 4th Joint Seminar of the Ministry of Defence and the Society of International Law (Singapore) 2 September 2000) [unpublished], online: Singapore, Ministry of Defence http://www.mindef.gov.sg/dmg/ls/il400.doc 10 at 13.

[343] Thomas M. Franck, "Use of Force and Law of Armed Conflict Issues before the International Court of Justice" (Paper presented to the 4th Joint Seminar of the Ministry of Defence and the Society of International Law (Singapore) 2 September 2000) [unpublished], online: Singapore, Ministry of Defence http://www.mindef.gov.sg/dmg/ls/il400.doc 20 at 28 [Franck].

[344] Hugh M. Kindred, *et al*, eds., 6th ed., *International Law: Chiefly as Interpreted and Applied in Canada: Documentary Supplement* (Toronto: Emond Montgomery Publications Limited, 2000) at 2 [Kindred - Documents].

[345] Franck, *supra* note 343 at 38.

broad range of situations that, traditionally, might not have been regarded as 'threats to the peace'."[346]

This section of Part 2 reviews the meaning of the 'domestic jurisdiction' element of Paragraph 2(7) of the United Nations (UN) Charter and concludes that more than 50 years of erosion of matters essentially within domestic jurisdiction leave few matters which would result in intervention.

This erosion has "occurred in tandem with a flexible and broadened definition of 'threats to the peace'".[347] It will be argued that there is no need for the Security Council to continue to broaden its 'threats to the peace' provisions, but simply allow the UN Secretary-General to enforce matters essentially within international jurisdiction.

The analysis of the meaning of these words will be developed within the context of the International Court of Justice's finding in the *Nicaragua v. U.S.* case which findings included the statement that "to challenge a rule of international law, the state practice relied upon must be clearly predicated on that different rule of law."[348]

There are five elements to this section and we will first review the historical background of paragraph 2(7), then analyze literature defining the meaning of the phrase 'essentially within the domestic jurisdiction', consider some post-Cold War examples and consider paragraph 2(7)'s applicability in today's environment.

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[346] *Ibid.* at 41.
[347] *Ibid.* at 42.
[348] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo" (1999) 32 Vand. J. Transnat'l L. 1231 at 1238 [Charney].

The Historical Developments[349]

Prior to the development of international organizations, states decided upon the nature and extent of their obligations and commitments on the international stage. The agreeing to commitments was an important element of state sovereignty and the subsequent fettering of state control was an exercise of a state's sovereignty.[350] "…[T]he requirement of consent was so complete that not only could a state not be bound by a rule of international law to which it had not consented but it could not even be bound by an external interpretation of its freely given obligations, unless it had surrendered the power to interpret the obligation to some other organ."[351]

The twentieth century saw a tremendous increase in the number of international organizations (Ios) being established and in the number of treaties being executed and ratified. These two elements introduced changes to the principle of state sovereignty. The European Union's human rights principles and processes is one significant example of the fettering of state sovereignty.

We begin the review of this Charter paragraph by reflecting upon the impact of a similar paragraph in the Covenant of the League of Nations (Covenant).

Paragraph 15(8) of the Covenant[352] required that the League Council to perform a quasi-judicial function as the Council determined which matters in dispute between

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[349] For a significant review of the historical developments leading to the adoption of Article 2(7) see Gorowny J. Jones, *The United Nations and the Domestic Jurisdiction of States: Interpretations and Applications of the Non-Intervention Principle* (Cardiff, Wales: University of Wales Press, 1979) at 18 [Jones] and Charles Brothers Hilson Fincham, *Domestic Jurisdiction: The Exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United Nations: A Contribution to the Study of Article 15, Paragraph 8 of the Covenant and Article 2, Paragraph 7 of the Charter* (Leiden, S, Afr.: 1948, A.W. Sifthoff's Uitgeversmaatschappij N.V.) [Fincham].

[350] J.S. Watson, "Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter" (1977) 71 Am. J. Int'l L. 60 at 61 [Watson].

[351] *Ibid.*

[352] Paragraph 15(8) of the Covenant of the League of Nations reads:

parties were matters "solely" within the domestic jurisdiction of the party. The standard which the Council was to apply in their determination was the standard of international law.

The Permanent Court of International Justice (PCIJ) ruled on the issue of domestic jurisdiction in the *Case of the Nationality Decrees in Tunis and Morocco*[353], however, the Court looked to international politics for an answer and proclaimed that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question: it depends upon the development of international relations."[354] The court also seemed to suggest that the definition of what remains a matter within domestic jurisdiction may change over time as international relations develop.[355]

Several important differences are noted when comparing Paragraph 15(8) of the Covenant with the current Paragraph 2(7). These differences are: first, the exclusion of any reference to international law in the Charter, second, no mention of which entity will determine whether a matter falls within domestic jurisdiction, third, the inclusion of the word – intervene, and, most importantly, for the purpose of our review, the substitution of the word 'essentially' (Charter) for the word 'solely' (Covenant).

> If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as to its settlement.

[353] Antonio F. Perez, "On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism under the United Nations Charter" (1996) 31 Tex. Int'l L.J. 353 at 360 [Perez].

[354] *Ibid.*

[355] This position is upheld in that a history of UN intervention confirms changes to how nations have changed their viewpoints. The UN Security Council's authorization of the enforcement actions in Iraq (to protect Kurds), Somalia (starvation) and Yugoslavia (to regulate succession) were in opposition to the accepted doctrine of the previous twenty years which viewed these matters as purely internal struggles and therefore violations of Article 2(7). Michael K. Murphy, "Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation" (1999) 39 Va. J. Int'l L. 1181 at 1196 [Murphy].

To assist us in understanding these differences we begin with a short review of the events leading to the final draft of this paragraph of the Charter.

The UN Charter's final draft was agreed to during the San Francisco Conference in 1945.

During the preparatory discussions at the Dumbarton Oaks conference, the intention of the participating nations was that Covenant Paragraph 15(8) be transferred and adapted to the United Nations.[356] At both these conferences, a number of proposals were put forward.

With respect to the determination of matters of domestic jurisdiction, a Greek proposal on this issue suggested that the International Court of Justice (ICJ) be the forum.[357] The Belgian delegation suggested that the General Assembly should have "sovereign competence to interpret the provisions of the Charter." [358] Both these recommendations failed.

The American delegation had great influence in the final wording which was accepted[359] with the understanding that Paragraph 2(7) was not simply a technical rule but a new and fundamental principle governing not only the central bodies but all organs of the UN. Secretary Dulles added that this change was necessary because the UN was significantly different from the League of Nations and from the organization which was initially proposed at Dumbarton Oaks.[360] It was argued that limits needed to

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[356] Simma – Charter, *supra* note 304 at 142.
[357] Watson, *supra* note 350 at 62.
[358] *Ibid.*
[359] Simma - Charter, *supra* note 304 at 142.
[360] Jones, *supra* note 349 at 26.

be placed upon the UN as the Charter grants more extensive "competencies" to the UN than the Covenant granted to the League of Nations.[361]

The result of the negotiations was a paragraph which seemingly confirmed the strength of the principles of state sovereignty and non-intervention by securing the scope of state jurisdiction (excluding matters 'essentially of domestic jurisdiction' instead of 'solely of domestic jurisdiction')[362], prohibited UN intervention unless a determination was made pursuant to Chapter VII provisions, and allowed for the process of determination of domestic jurisdiction to "...be deduced from interpretation and practice."[363]

The final text of Article 2(7) also suggests that the intent of the nations was to expand the range of subjects to which the principle of non-intervention would apply by firstly, moving this paragraph to the "Purposes and Principles" section and secondly, by making a matter 'essentially' instead of 'solely' within a state's domestic jurisdiction.[364]

The most significant change, that of not stating who determines which matters are essentially of domestic jurisdiction, may be a follow up to the *Case of the Nationality Decrees in Tunis and Morocco* in allowing the flexibility (or handcuffing) which, general acceptance by nations, allows for. Professor Perez notes that "...the diffusion of competence in the UN Charter suggests the charter's framers believed the scope of domestic jurisdiction would best be determined by the resolution of disputes

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[361] Simma - Charter, *supra* note 304 at 142.
[362] The United States delegation hoped that by changing the wording from "solely" (League Covenant) to "essentially" it would lead to a greater range of matters to be included within the domestic jurisdiction element of this article. With the inclusion into the UN Charter of principles and organs which would deal with the economic and social progress of nations, the American concern was that these organs not "penetrate into the economic and social life of member-states." Jones, *supra* note 349 at 20.
[363] Simma - Charter, *supra* note 304 at 142.
[364] Perez, *supra* note 353 at 360.

according to principled debate rather than merely the reflection of existing distributions of power."[365]

Interpretation of Paragraph 2(7)

General

One of the overriding principles stated in the UN Charter is that of state sovereignty. The Charter also places obligations not only upon UN members but on non-members as well.[366] This implies that state sovereignty is fettered as states are "free and sovereign within the limitations imposed upon them by the Charter."[367]

To safeguard the remaining state powers, the drafters of the Charter included within its principles section, Paragraph 2(7). This paragraph "comprises [of] two different rules."[368]

The first rule places an obligation upon the UN by prohibiting intervention with respect to matters essentially within domestic jurisdiction. The second rule places a restriction upon member states, releasing them from submitting matters to settlement under the Charter.

Although the majority of this discussion will centre upon the "essentially within the domestic jurisdiction" element of the first rule, our review of Paragraph 2(7) begins with a short analysis of the word "intervene".

There has been significant discussion amongst legal scholars as to the meaning of the term – intervene. Did the founding nations mean the term to conform to Oppenheim's classical definition – the "dictatorial interference by a State in the affairs

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[365] *Ibid.* at 361.
[366] UN Charter Article 2(6).
[367] Jones, *supra* note 349 at 18.
[368] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (New York: Frederick A. Praeger Inc., 1950) at 769 [Kelsen – United Nations].

of another State for the purpose of maintaining or altering the actual condition of things"[369] or were there more expansive definitions?

Many writers submit that the drafters intended that the non-intervention stated in this paragraph "meant no interference in any form."[370] Nevertheless, this viewpoint was not shared amongst all the conference delegations.[371] The French felt that the inclusion of this term would prevent the UN from acting until it was too late (when dealing with aggression) while the Chinese felt that it was wrong to limit the Security Council's powers to enforcement measures and not allow for the pacific settlement of matters which may be within a state's domestic jurisdiction. The Chinese delegation further added a statement which was to foreshadow events evidenced throughout the 1990s and which would become a rallying point for Secretary-General Annan's culture of prevention policy. This statement was that "[p]revention is better than cure."[372]

In analysing the first rule, it is clear that the UN is prohibited from intervening in domestic jurisdictional matters unless the peace and security element is invoked. Although, within the text of this paragraph there is no similar obligation upon member states, the obligations of Paragraph 2(4) imply that the non-interference in domestic matters is also applicable to them.[373] The reasoning continues in that if a matter is not 'essentially within the domestic jurisdiction of any state' then the UN would not be intervening or interfering when it arrives to deal with these matters. Stated another way, matters would be within international jurisdiction.

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[369] L. Oppenheim, *International Law: A Treatise Vol I Peace* (New York City: Longmans, Green and Co., 1912) at 188 [Oppenheim].
[370] Jones, *supra* note 349 at 23.
[371] For a more complete discussion see Jones, *supra* note 349 at 24-26.
[372] *Ibid.*
[373] Kelsen - United Nations, *supra* note 368 at 770.

Interpretation during the Cold War

Dealing with the issue of domestic jurisdiction, a review will first be conducted of the meaning of "essentially" and contrasting it with the wording used in the Covenant's Paragraph 15(8) – "solely".

Although the current wording appears to be a substantial change from that previously used to deal with matters of intervention, various commentators have suggested that there is no substantial change.

In an extensive review of the UN Charter, Professor Kelsen stated, "[s]olely within the domestic jurisdiction of a state are only matters which, for the time being, are not regulated by a rule of international law."[374] He goes on to add that even if a matter is not regulated by a rule of international law, it does not mean that that particular matter does not fall within international law in another manner. For example, a state may act in any manner it desires (if no international law otherwise imposes an obligation upon that particular behaviour) until such time as another state indicates that the behaviour which is claimed to be within domestic jurisdiction impacts upon the second state. This then becomes a dispute between two states and therefore, an international dispute. This position was based upon the Covenant's granting of the right to settle disputes to the League of Nations' Council.

In accordance with the current wording, the UN may not intervene in any way. However, if a matter is brought to the attention of the UN by a member with the purpose of determining whether or not a matter is essentially domestic in nature, the

[374] *Ibid.* at 771.

process of discussion and investigation by the UN would not be a violation of this paragraph.[375] There are a number of examples of this process occurring.[376]

Professor Kelsen concluded that the wording change has no effect because there are no matters 'essentially' within domestic jurisdiction.[377] As long as there is some obligation or connection to international law, the matter is never essentially within domestic jurisdiction. Kelsen goes on and adds that this change was a dangerous change in that some states may advance an argument that even if they are under an international law obligation the matter under consideration remains domestic as it is "essential to its [state's] sovereignty."[378] For a matter to fall within the 'essentially domestic' test the matter under advisement "does not depend upon its being regulated or not regulated by a rule of international law, but upon its own nature."[379]

Kelsen also points out that there are a number of UN Charter articles which appear to be inconsistent with the Paragraph 2(7). Two of these are the Article 55 provisions stating that the UN is to promote higher standards of living, arrive at solutions to health and related problems, and promote respect and observance of human rights and the Article 62 provision which includes within the terms of reference of the Economic and Social Council the initiation of studies and the preparation of reports on economic, social and human rights issues.[380] Professor Kelsen further notes that the

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[375] *Ibid.* at 772. In 1946 the matter of the treatment of Indians was brought to the General Assembly by India. Despite the Union of South Africa's objections the General Assembly intervened by adopting a resolution expressing an opinion and calling for a report on the situation. *Ibid.*

[376] In 1946 the matter of the treatment of Indians was brought to the General Assembly by India. Despite the Union of South Africa's objection that the matter was domestic in nature, the General Assembly intervened by adopting a resolution which expressed an opinion and called for a report on the situation. *Ibid.*

[377] *Ibid.* at 776.

[378] *Ibid.* at 779.

[379] *Ibid.* at 778.

[380] Kindred - Documents, *supra* note 344 at 12-13.

requirement of member nations to "take joint and separate action in co-operation with" the UN pursuant to Article 55 is inconsistent with the provisions of Paragraph 2(7).

Professor Hersch Lauterpacht, has also devoted significant thought to the domestic jurisdiction element. Writing at the same time as Kelsen, Lauterpacht notes that there are few matters which are 'essentially' of domestic jurisdiction and also suggests that the test for domesticity is whether or not the subject matter in question can assume an "international complexion."[381]

More specifically, he tackles the question of the jurisdictional issue by arguing that:

1. a matter is not domestic if it becomes a subject of international obligation undertaken by a state;
2. if a matter is neither regulated nor capable of being regulated by international law then it remains domestic;
3. a matter "is essentially of domestic concern if it is incapable by its nature of assuming an international complexion" – does not have international repercussions;
4. in our modern (1950) age where economic and political interdependence is growing, a matter which appears, on the face of it, to be of domestic jurisdiction may in fact be 'essentially' international; and
5. if the nature of the dispute or situation is such as to "constitute a direct or potential threat to international peace and security" the matter falls within international jurisdiction.[382]

To buttress his position, Professor Lauterpacht added that the drafters of the UN Charter did not draft Paragraph 2(7) to "introduce a disintegrating element into the Charter" but, a provision separating international from domestic matters for those issues which are or have the potential to be a danger to world peace. Human rights fall within this classification as violations of human rights are or have the potential to be a danger

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[381] Lauterpacht, *supra* note 211 at 175.
[382] *Ibid.* at 175-176.

to world peace.[383] Nevertheless, immediately thereafter, Lauterpacht seemingly places a limit on how the UN should become involved in situations where a member does not meet their human rights obligations. He added that this article would be meaningless if it was interpreted to exclude the right of investigation and recommendation which the Charter provides in other articles.

By following this reasoning, the conclusion he draws with respect to the issue of human rights is that these are matters within international jurisdiction not just resulting from the obligations accepted by nations, but that these obligations also "constitute, in various ways, a persistent theme of the Charter and one of its principal features."[384]

With respect to the missing phrase 'according to international law' (as compared to the Covenant), Lauterpacht dismisses outright the argument that the elimination of reference to this phrase restricts the UN more drastically than the League of Nations. He adds that the given verbal reason for the elimination of this reference is exactly that – "verbal and devoid of legal consequences" – and as a result inconsequential.[385] Professor Lauterpacht also cites the PCIJ's ruling in the case of the *Tunis and Morocco Nationality Decrees* for the principle that international law evolves and develops with time and is not a rigid concept.

M.S. Rajan provides an Indian sub-continental perspective in assisting us in interpreting the meaning of these elements of paragraph 2(7).

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[383] *Ibid.* at 177-178.
[384] *Ibid.* at 176.
[385] *Ibid.* at 177. The given reasons provided to President Truman for the elimination of this reference to determination of jurisdictional issues included that 'international law on the subject was indefinite and inadequate' and that 'to the extent that the matter is dealt with by international practice and textbook writers, the conceptions are antiquated and not of a character which ought to be frozen into the new organisation.' *Ibid.*

Based upon his study of UN practice in this area, he concluded that in opposition to attempts by the drafters of the Charter to limit the scope of UN intervention "it seems that there is virtually no limit to the jurisdiction of the United Nations in this field."[386]

The reasons for this position are that there are no generally accepted technical meaning of the word 'essentially' and that "*ad hoc* decisions had to be taken in each individual case according to the merits and circumstances – factual, legal and political" in each particular case.[387]

His interpretation of the results of his study was that there were many reasons for this conclusion. First and foremost among the reasons was that there are increasing numbers of factors which are forcing closer together the complex relations among states with the result that fewer and fewer matters fall 'essentially within domestic jurisdiction'.

He goes on and suggests that the drafters of the Charter knew that they were extending the boundaries of jurisdiction given to the UN than those given to the League of Nations and yet they tried to holdback or reverse the advancing tide of matters of international jurisdiction by drafting paragraph 2(7).[388]

Rajan lists several other factors for the expansion of international jurisdiction and notes them as follows:

1. the increased use of non-legal criteria by UN organs as a result of "[t]he omission of the specification of a criterion for determining the nature of jurisdiction";

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[386] M.S. Rajan, *United Nations and Domestic Jurisdiction*, 2nd ed. (Bombay: Asia Publishing House, 1961) at 361 [Rajan]. His study covered UN action until 1956. The field he refers to is the wide range of non-political activities which are regularly dealt with by UN bodies.
[387] *Ibid.*
[388] *Ibid.* at 362.

2. the omission of an authority to decide this point has left this decision by default to the political organs to decide matters by simple majority;[389]
3. would a negative or positive determination re: jurisdiction assist in carrying out the purposes of the Charter;[390]
4. a definition of the scope of jurisdiction would not be desirable for it may impede the advancement of international security and peace.[391]

Rajan concludes his extensive study of this subject by noting that it was probably the intention of the drafters of the UN Charter not to preserve the *status quo* but to allow relations between and among states to grow and progress. He writes that although amending the Charter would be preferable it would be impracticable in light of the "present temper of international relations" and offers the suggestion that the only course available to the UN is to make *ad hoc* decisions in each case as they come forward.[392] Rajan also adds that "[t]he Charter is essentially a political document in a legal garb" and that the UN's primarily purpose is to "achieve certain broad political ends – not to embody certain legal rights and obligations of the signatories."[393]

Writing forty years after Kelsen, Professor Louis Henkin states that there continues to be no agreement with respect to the boundary between domestic and international jurisdiction or "what constitutes intervention or other impermissible interference."[394] Prof. Henkin finds domestic jurisdiction in matters which are not a proper subject of foreign or international concern. Matters which find themselves "governed by international law or agreement [are] ipso facto and by definition not a

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[389] Rajan discusses the problem of different voting regimes upon the operation of paragraph 2(7) at 107 when he mentions that the Great Power veto, two-thirds majority in the General Assembly and the simple majority in the Economic and Social Council may result in these organs each coming to different decision with respect to domestic jurisdiction.
[390] *Ibid.* at 362.
[391] *Ibid.* at 385.
[392] *Ibid.* at 404.
[393] *Ibid.* at 382.
[394] Louis Henkin, *The Age of Rights* (New York City: Columbia University Press, 1990) at 52 [Henkin].

matter of domestic jurisdiction."[395] He goes on to add that matters which appear to be under domestic jurisdiction may fall under international jurisdiction because the state may takes steps, such as signing a treaty, to change the jurisdiction.

Henkin agrees with other scholars that there is no interference if a matter is treated as not being part of a state's domestic jurisdiction.[396] The UN would not be interfering or intervening in a state if the matter which has caused the action is within the UN's granted jurisdiction.

Intervention, for Henkin, remains the Oppenheim definition of dictatorial interference by force or threat thereof. He then adds that there are many measures which may be bad diplomatic manners but fall short of intervention and do not violate any international law. These measures include the ability of a government to express views about or criticize publicly actions taken by another government and governments determining trade and aid policies based upon the their acceptability of another government's actions.[397] These actions may even be taken with the view of attempting to change or influence the other government's behaviour and still not violate international laws.

One of the matters which nations have claimed fall within the purview of domestic jurisdiction is that of human rights. Henkin dismisses the arguments which have been used by nations to attempt to leave human rights issues within domestic jurisdiction by arguing the following:

1. virtually all states are now subject to some international law or obligation with respect to at least some human rights issues.

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[395] *Ibid.*
[396] *Ibid.*
[397] *Ibid.* at 53.

As a result, human rights issues are not matters of domestic jurisdiction and therefore action to bring compliance with human rights obligations is not improper interference;

2. unless an agreement provides otherwise, any party to an international agreement may enforce the remedies and recourses generally available to deal with breaches of international agreements;
3. to deal with arguments dealing specifically with the Helsinki Accord – despite the fact that it may not be necessarily a binding agreement, "adherence to the Accord is nonetheless an international undertaking and violation of its provisions is a proper basis for peaceful international recourse"; and
4. measures short of dictatorial intervention are not interference but expressions of legitimate self-interest within that state's domestic jurisdiction.[398]

In discussing non-intervention, Professor Henkin notes that the UN is not the only body which may react to violations of human rights, but, any member may "properly respond to violations of Charter norms, at least to a 'consistent pattern of gross violations' of human rights."[399]

In the area of human rights, by trying to pigeon hole an intervention into the peace and security exception of Paragraph 2(7), scholars are perpetuating the myth that human rights are essentially matters of domestic jurisdiction. It is this writer's position that the opposite tact should be taken – that UN action or the action by a UN member to prevent human rights violations is within their obligations as an organization or member and therefore it is not intervention.

Jones reinforces the prevailing view in stating that the UN was "not conceived as an instrument for the enforcement of human rights" and even though members of the UN accept the obligations of the UN Charter, members have not accepted any "precise

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[398] *Ibid.* at 55.
[399] *Ibid.* at 62.

legal obligations in respect of the human rights of their subjects."[400] To further explain this position Jones writes that the drafters of the Universal Declaration of Human Rights never intended this document to impose legal obligations except if they have "voluntarily bound themselves to respect and observe human rights through ratifying treaties, or conventions, or the international covenants on human rights".[401]

Jones does acknowledge, that during the 1946-1950 period, the UN General Assembly considered itself competent to "adopt various procedures in cases of alleged violations of human rights."[402] The resolution noting the situation in South Africa was further reinforced in the 1960s where the issues of apartheid and the treatment of persons of Indian and Pakistani background were combined resulting in a further resolution which requested members to take steps to break off diplomatic and economic relations with South Africa.[403] Even with this resolution, the international peace and security provisions were referred to as justification for the UN General Assembly to take action via Paragraph 11(2).

Jones concludes that the UN intervenes on issues of human rights in those states which have first voluntarily ratified international human rights agreements. He suggests

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[400] Jones, *supra* note 349 at 34.
[401] *Ibid.* at 36.
[402] *Ibid.* at 44. For a more complete review of the actions taken by the UN General Assembly in this period against the Union of South Africa (treatment of citizens of Indian background) and the U.S.S.R. (wives of foreign citizens and denial of basic human rights to clerics in Bulgaria, Hungary and Romania) see *Ibid.* at 38-53. The end result was that despite these nations' positions that these matters were of domestic jurisdiction, the General Assembly intervened and passed resolutions based upon three grounds: first, that the human rights articles in the Charter and the Declaration did create obligations upon members, second, that the countries in question had broken contractual obligations they had under international agreements, and three, that the likely impairment of relations with other nations over the treatment of citizens of Indian background and of wives of foreign citizens removed those matters from domestic to international jurisdiction. None of the resolutions recommended enforcement action by the Security Council.
[403] *Ibid.* at 57.

that the danger in this is that it implies that human rights remain a matter of domestic jurisdiction until ratification of international agreements.[404]

Jones then advocates that the UN should acknowledge that the UN has accepted a legalistic approach when dealing with matters of human rights. This approach involves the voluntary state acceptance of legal obligations originating with international agreements as well as a requirement that the ratifying states observe the procedures set out in those agreements. Jones adds that the UN should abandon its previous approach to human rights and allow for the legal approach to predominate in order to reduce antagonism between members and to allow the UN to develop legitimacy to attend to matters within its competence under the Charter.

Jones also reviewed the issue of peacekeeping in the context of the non-interference element of Paragraph 2(7), however, events resulting from the end of the Cold War and the interventions taken during the 1990s and early twenty-first century obviate those comments.

Post-Cold War Commentary

During the Cold War era, international politics and intra-state conflict focused on issues arising between the two primary Cold War protagonists – the United States of America and the Union of Soviet Socialist Republics and their respective blocs of influence. The result was that the UN was stymied.

The North Atlantic Treaty Organization's (NATO) Kosovo intervention lead to a number of world commentators considering the legality of this intervention taken outside the terms of paragraph 2(7)'s peace and security provisions. Our review of some

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[404] *Ibid.* at 63.

post-cold war thought on the subject of this section begins with two articles considering the issue of change to international law offered from both sides of the Atlantic Ocean. Several articles suggesting intervention for reasons such as refugees, dowry deaths, and environmental damage will also be reviewed.

Kosovo Intervention

Professor J. Charney reviewed the Kosovo intervention by attempting to reconcile the principles of non-intervention based upon paragraph 2(7) and the moral and ethical arguments in favour of humanitarian intervention, or as in the case of Kosovo, "anticipatory humanitarian intervention'.

Charney mentions the duties associated with the principle of *erga omnes* within the context of contemporary international law prohibiting human rights violations by a state against its own people. He adds that every state is obligated to respond to these forms of violations of international law by the use of non-forcible interventions[405] and then asks the questions whether this also applies to forcible intervention by a state or collection of states. He concludes that contemporary international law has not expanded to include forcible provisions for situations requiring humanitarian intervention except under paragraph 2(7) of the Charter or a state's right of self-defence.

The section of Prof. Charney's paper which is particularly relevant to the thesis is where he considers the process of how new international law develops.

He suggests that there are three elements which prevent a change in international law to provide for humanitarian intervention. These are: one, a rule of international law must be replaced by a different rule of law (as identified in the *Nicaragua* case), two,

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[405] Charney, *supra* note 348 at 1232.

the UN Charter states a prohibition against the use of force and overrides all inconsistent treaties, and three, that the Charter restrictions on the use of force are a *jus cogens* norm and it would take a new *jus cogens* norm to override the previous one.

In further analysing the argument for humanitarian intervention as part of the human rights provisions of the Charter, Charney responds that there is no widespread agreement amongst UN members sufficient enough to give the concurrence that there is sufficient persuasive power available to agree with the proposition. The second element which Charney offers for consideration is his response to the argument used that the law has changed radically enough with respect to humanitarian intervention to allow it to stand as the new norm. He advises that there has been no widespread support or practice for this proposition amongst nations nor does *opinion juris* exist to support this view.[406] In the end, Charney notes that in the area of humanitarian intervention there is a conflict between the risk of abuse of this authority to intervene balanced against the moral responsibilities posed by this issue.

The Kosovo situation provided the background for a European analysis of the situation relating to any emerging doctrines allowing forcible measures to prevent a state from committing large-scale atrocities on its own territory.

Antonio Cassese, a presiding judge of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) and former president of the ICTY submitted two articles on this topic.

Judge Cassese agrees with Professor Charney that the NATO action was illegal and then takes the position that when the three sets of values (within the current

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[406] *Ibid.* at 1241.

international law framework) – peace, human rights and self-determination – come into conflict, "peace must always constitute the ultimate and prevailing factor."[407] Cassese also expressed deep concern about the potential lack of restraint in place to deal with the opening of the pandora's box of groups of powerful nations taking their own measures. He agrees that from an ethical point of view the intervention was justified, but that the action was contrary to international law.[408]

Of particular relevance to this paper are Cassese's comments with respect to two issues. The first was whether or not the NATO action was partially justified by contemporary trends in international law and the second was whether this action is part of the legitimization process which would allow for nations or groups of nations to take humanitarian action outside any authorization of the Security Council.

After tracing six factors from which one could conclude that "'positive peace,' i.e. the realization of justice, could prevail over 'negative peace' i.e. the absence of armed conflict"[409] Cassese lists six conditions under which "resort to force may gradually become justified." These six conditions are:

1. "gross and egregious breaches of human rights involving the lose of life of hundreds or thousands of innocent people" carried out by the central government or with its support or because of its collapse;
2. the crimes against humanity of condition 1 resulting from anarchy in a state Proof is necessary to show that the state has not called on others for help and is unable to prevent the crimes itself. If the crimes are being committed by the central government then there must be a pattern of withholding cooperation from the UN or others;
3. disagreement or veto being exercised in the UN Security Council;
4. all peaceful measures, consistent with the urgency of the situation have been attempted and failed;

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[407] Antonio Cassesse, "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 E.J.I.L. 23 at 24 [Cassesse – Ex iniuria].
[408] *Ibid.* at 25.
[409] *Ibid.* at 27.

5. a group of countries decides to try to stop the atrocities with at least the non-opposition of the majority of UN members; and
6. the goal of the forcible measures used to stop atrocities and restore respect for human rights and nothing else. The armed forces used are commensurate and proportionate with the situation.[410]

Cassese concludes his article by noting that interventions similar to the Kosovo intervention, though a breach of current international law, may gradually lead to a change in international law allowing humanitarian intervention to become a second exception to the UN Charter system of collective enforcement in the same way that self-defence, as set out in Article 51, is currently an exception.[411]

In a second paper in 1999, Judge Cassese takes the opportunity to review the positions of the various NATO countries with respect to the Kosovo intervention.[412] He concludes that although there may be situations where there is a single episode of some magnitude to establish new international law (such as the norm concerning the free use of space in violation of the *usque ad sidera* sovereign rights), the Kosovo intervention was not of sufficient magnitude to qualify. To set aside a principle which has immediate practical application to all nations (as opposed to the space law a domain where few will venture) takes more than just one event and Cassese suggests that "it thus seems judicious to await any repetition of such actions under the same conditions and exigencies."[413]

Cassese then suggests that perhaps under the principle of *opinion necessitatis* a new rule may develop. Although this principle was shared by the NATO nations, it was

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[410] *Ibid.*
[411] *Ibid.*
[412] Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*" (1999) 10 E.J.I.L. 791 at 796 [Cassese- Opinio Necessitatis].
[413] *Ibid.* at 797.

not necessarily shared by others and as a result, the conditions for this type of intervention (set out above) need to be met.

Although offering useful suggestions for the future, Judge Cassese seems to prefer trials to deal with matters than attempts to prevent them.

Contemporary Suggestions for Intervention

In a paper dealing with intervention to prevent refugees and displaced persons, Freedman concluded that the Security Council could adopt enforcement measures in response to massive refugee situations if that situation has international implications.[414] After reviewing several situations during the early 1990's when the UN had intervened in displacement situations (Iraq, Yugoslavia, Rwanda, Haiti and Somalia) Freedman concludes that these situations result from "ambiguous and unenforced rights" from humanitarian and human rights law. He adds that the UN action has resulted in the issue of massive-displacement becoming a matter of international jurisdiction rather than domestic and concludes that "states can no longer uproot their own citizens with impunity, shielded by the doctrine of non-intervention".[415]

The issue of dowry deaths is reviewed in a paper prepared by Laurel Pardee.[416]

The physical abuse of women and the issue of dowry in India is a result of the woman's subjugated position in Indian society.[417] Pardee argues that dowry deaths are no longer of domestic jurisdiction for several reasons. She cites the exceptions to the principle of non-intervention (state and UN action including Resolution 688 dealing

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[414] Paul Freedman, "International Intervention to Combat the Explosion of Refugees and Internally Displaced Persons" (1995) 9 Geo. Immigr.L.J. 565 at 579 [Freedman].
[415] *Ibid.* at 601.
[416] Laurel Remers Pardee, "The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?" (1996) 13 Ariz. J. Int'l. and Comp. L. 491 [Pardee].
[417] *Ibid.* at 511.

with Iraqi Kurds) and then discusses the intent of the UN Charter and concludes that there is no indication that the drafters of the Charter "were willing to sacrifice human rights to the ideal of a peaceful world"[418] She also argues that "a right without a remedy implies the right does not exist" all leading to her final conclusion that even matters of cultural relativism[419] are no longer within domestic jurisdiction.

The issue of serious environmental harm as a matter of international jurisdiction has also been considered.[420] In support of this suggestion, Murphy pins his argument on the idea that this is an issue of international jurisdiction within the provisions of the self-defence by nations. He compares an immediate environmental threat to the destruction resulting from armed attack producing loss of life, property damage and refugee flows[421] and looks to the UN Security Council's decisions on intervention in the early 1990's in "addressing non-traditional breaches of peace" as a trail to be followed in including environmental disasters within the Security Council's enforcement powers.[422]

Applicability to UN action

The UN has the authority and some argue, the obligation, to deal with matters of international jurisdiction. The stumbling block on the road to Secretary-General Annan's "culture of prevention"[423] within the context of Paragraph 2(7) is defining matters which fall under international jurisdiction. The importance in arriving at a

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[418] *Ibid.* at 513-514.
[419] Pardee notes that "countries resistant to universal human rights have often used cultural relativism [the ability to live out ones cultural life without interference] as a shield against compliance." *Ibid.* at 511.
[420] Murphy, *supra* note 355.
[421] *Ibid.* at 1218.
[422] *Ibid.* at 1197.
[423] Kofi A. Annan, *Prevention of Armed Conflict: Report of the Secretary-General* (New York: United Nations, 2002) at vii [Annan].

definition is that the Security Council will then not need to try and fit matters, coming to its attention, into the pigeon hole of the articles of Charter VII.

Although the current system at the Security Council appears to be working, in some ways the process simply reinforces antiquated positions with respect to the importance of state sovereignty.

History records that while diplomats discuss and debate the two elements of the exception element of paragraph 2(7) (as set out in Chapter VII), mankind suffers human rights violations ranging from displacement to death. What is needed is an understanding that should a state violate the principles of the UN Charter (which they agreed to when becoming UN members and being able to take advantage of the benefits membership offered) they will expect a range of quick responses to their action or inaction as suggested by Judge Cassese.

It is submitted that the process of changing the *jus cogens* norm as suggested by Professor Charney and Judge Cassese had begun some time ago. An argument can be advanced that each resolution passed by the Security Council or General Assembly of the UN (despite the lack of binding authority of some of the resolutions), every action taken by a country or group of countries, every visit by the UN Secretary-General to countries finding themselves at war with a neighbour (internally and externally) and every appointment of UN Special Rapporteurs on various topics of international interest – all are elements of the changing norm. The Kosovo action was a part, not a beginning, of the continuum of the changing practice of states.

Where Gorowny Jones concluded that the drafters of the UN Charter intended that the following matters remain within the purview of domestic jurisdiction:

1. form of government;
2. treatment of state's citizens, including human rights;
3. economic policies (in the absence of treaties);
4. immigration;
5. nationality;
6. size of national armaments and armed forces;
7. internal conflicts within the nation's territory; and
8. administration of non-self-governing territories[424]

it is becoming increasingly evident that as a result of the requirements of international cooperation, as evidenced by treaties and the day-to-day operations of globalization, fewer of these matters are remaining 'essentially within domestic jurisdiction'.

In a detailed review of some 19 UN Security Council resolutions, Helmut Fruedenschub, a former Austrian alternative representative on the Security Council, drew some interesting conclusions.[425]

His first conclusion was that "a new instrument has been created out of the need to fill the gap between the invocation of an inapplicable or inopportune right to collective self-defence and the unwanted application of the system of collective security."[426] That there has been an extension of the definition of 'threat to the peace' of Article 39 of the UN Charter to include the range of applications from the traditional application of force against an aggressor (Iraq-Kuwait) to situations of humanitarian emergencies (Bosnia and Somalia), enforcing the implementation of sanctions aimed at reversing aggression (FRY), restoring a legitimate government (Haiti), protecting UN peacekeepers (UNPROFOR – FRY) to avenging attacks on peacekeepers (UNOSOM II – Somalia).

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[424] Jones, *supra* note 349 at 31.
[425] Helmut Fruedenschub, "Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council" (1994) 5:4 E.J.I.L. 492 [Fruedenschub].
[426] *Ibid.* at 522. The issue of the powers of the UN Secretary-General is discussed in detail in Part 5 of the thesis.

Counsellor Fruedenschub also concluded that many distinctions, including the one between decisions and recommendations of the Security Council under its Chapter VII powers, are academic when you consider the lack of consistency amongst the various Security Council resolutions. This point seems to reinforce the previous discussion by Rajan where he concluded (in the late 1950's) that *ad hoc* decisions had been taken based upon the merits and circumstances of each case.

The additional interesting point of Fruedenschub's article is that over the 19 resolutions which were part of his study, the Security Council was inconsistent as to who was authorized to do certain acts. In additional to calling on and authorizing states to act (eight resolutions), the Security Council authorized states and the UN Secretary-General to act in one and reaffirmed his ability to act in another resolution.[427]

One final Fruedenschub conclusion is relevant to our inquiry and that is where he advises that the Security Council has adopted a 'common law' approach to it's interpretation of the UN Charter.[428] That the Security Council has applied its Chapter VII powers in a manner deemed appropriate to a given situation and thereby confirming the upper hand gained by the common law approach over the approach of Charter fundamentalists.[429]

Conclusion

If international relations have crossed this Rubicon[430] in the development of international law, then we have arrived at the point in international history where the

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[427] *Ibid.* at 523.
[428] *Ibid.* at 526.
[429] *Ibid.* at 527.
[430] When Julius Caesar led his army in 48 BCE across the Rubicon, the river which separated the province of Cisalpine from the Roman heartland of Italia, he began the struggle that ended the Republic of Rome and replaced it with the Roman Empire.

UN Charter's purposes and principles are going to be able to be met. The next critical step is to ensure the proper application of resources at the right time (within days of a matter coming to the attention of the UN in the right place by the right person. By ensuring that these matters are in place, the UN may become a relevant institution and combat the comments about the UN's lack of relevancy levelled at it during the 2003 Iraq crisis.

PART 3 – PEACEKEEPING

This Part of the thesis will first establish the legal basis for peacekeeping and briefly review the history of peacekeeping taking us through the various stages of development of this element of the UN conflict resolution process.

3.1 – Introduction

The current nature of United Nations peacekeeping is characterized by robustness in mission and resources. Peacekeeping at the beginning of the twenty-first century stands in stark contrast with the peacekeeping which developed in reaction to the Suez Crisis of 1956 when lightly armed soldiers separated two belligerents.

Despite over 50 peacekeeping missions, the debate about the legal basis for peacekeeping still continues. The UN Charter makes no specific provision for peacekeeping. Nothing in the UN Charter obligates nations to provide armed forces to the UN. If there is no specific provision for UN forces, how is that almost one million soldiers will soon have served under the UN banner?

Part of the answer may have been foreshadowed in a 1943 memorandum from the American Secretary of State Hull to President Roosevelt which dealt with UN Charter Article 43 obligations and added that the Security Council should be free to make such *ad hoc* arrangements "as [it] may deem appropriate."[431]

Legal Basis for Peacekeeping

The United Nations does not have a standing army[432] (a matter which has long been debated). To deal with the enforcement of UN decisions and specifically the

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[431] Franck, *supra* note 343 at 54.

[432] Several of the reasons explaining the opposition in establishing a UN armed force including: nations resist in participating in areas where they have no strategic interests, smaller states and those who are not permanent members (P5) of the Security Council fear that they may be the object of the UN army while

Security Council (which is responsible for international peace and security), the UN Charter established two means of enforcement – measures using force and measures not using force.

Measures which do not include the use of force are set out in Article 41 of the UN Charter and include a continuum of pacific measures from partial economic sanctions to the severance of diplomatic relations.[433]

Should the UN Security Council determine that the pacific measures "be inadequate or have proved to be inadequate" the Security Council may call upon Member States to provide armed forces to take the necessary actions pursuant to Article 42 of the UN Charter. With no standing army, the apparent answer of how the UN is to generate armed forces is set out in Article 43.[434]

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the P5 may protect themselves, the likelihood that the P5 cannot agree on a politically acceptable and competent military commander and that a deadlocked Security Council may block any action to prevent or stop aggression. Major J.D. Godwin, "NATO's Role in Peace Operations: Reexamining the Treaty after Bosnia and Kosovo" (1999) 160 Mil. L. Rev. 1 at 21-22 [Godwin]. At the end of the Cold War when the then UN Secretary-General Butros Butros-Ghali proposed the establishment of a permanent UN military capability his suggestion had little support. The United States has also indicated that it would not supply armed forces to any force under UN command. K. J. Holsti, *The state, war, and the state of war* (Cambridge: Cambridge University Press, 1996) at 193 [Holsti].

[433] Pursuant to Article 41, the UN Security Council decides which measures to apply and they "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications and the severance of diplomatic relations." Kindred Documents, *supra* note 344 at 9.

[434] Article 43:

> 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
> 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 43 Special Agreements

Article 43 obligates Member States to provide "armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." The Members States are to provide these resources to the UN Security Council via special agreements.

To-date, no Article 43 agreements have been signed.[435]

There are a number of reasons for this. Professor Kelsen forewarned the UN about the current situation, when he noted that these special agreements "do not refer to the question as to whether or not the Member shall provide armed forces … they refer only to the question how these obligations … shall be fulfilled on the part of the Member."[436] Kelsen also highlights several other factors which Member States may have difficulty with in that the Article 43 provisions neither set out limitations on the use of state forces, nor limit where the Security Council may locate those forces.[437] These matters are left to the terms of the special agreement (treaties) which are to be signed between the contracting parties – Member State and the Security Council.

As noted earlier, the Member States do not have an obligation to conclude Article 43 agreements and as a result, the UN Security Council could fulfil its peace and security function by using the powers granted to it by Article 106.

Article 106 states that until the Article 43 special agreements are signed (allowing the Security Council to "exercise its responsibilities under Article 42") the

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[435] Alexander Orakhelashvili, "The Legal Basis of the United Nations Peace-Keeping Operations" (2003) 43 Va. J. Int'l. L. 485 at 486 [Legal Basis].
[436] Kelsen, *supra* note 368 at 750.
[437] *Ibid.* at 751-753.

permanent members (P-5) of the UN Security Council may jointly decide and execute military action on behalf of the UN.

Although these powers were intended as transitional powers, awaiting the execution of Article 43 agreements, they are still available to be used because the agreements have not been signed.[438]

Before these powers may be exercised by the P-5, they still need to follow the process of first determining the existence of a threat to peace and security and the necessity of Article 42 military enforcement measures.[439] The Security Council need not exercise this power if it sub-contracts the Article 42 measures to a joint Member State military action as was evident during the 1990-91 Iraq-Kuwait aggression.[440]

History shows that this provision has rarely been used due to the lack of agreement amongst the P-5 during the Cold War. Since the end of the Cold War, there is no evidence that Article 106 has been used because any act of intervention would undoubtedly be opposed by China (which maintains a non-interventionist stance even in the face of humanitarian crises[441]) and most recently France (2003 coalition invasion of Iraq).

In conclusion, absent the execution of Article 43 agreements, the Security Council "has no authority to command member states to commit their armed forces to a

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[438] Simma – Charter, *supra* note 304 at 1150 and Godwin, *supra* note 432 at 20. Some may argue that the recent establishment of the UN SHIRBRIG may fall within Article 43. The countries agreeing to commit forces to this force support the principle of Article 43 yet these countries have not signed an Article 43 agreement. *Ibid.* note 92 at 21.

[439] *Ibid.* at 1151.

[440] *Ibid.*

[441] During the 1990s there were at least three situations (Iraq – 1990, Haiti – 1994 and Albania – 1997) where China abstained from a vote at the Security Council thereby allowing the Security Council to mandate missions in these three situations which would have otherwise not been taken. The steps could be taken due to the "living tree doctrine" of constitutional interpretation where the plain reading of the UN Charter does not allow for the UN to interpret an abstention as a non-vote. Franck, *supra* note 343 at 27-28.

UN military enforcement action."[442] As already noted, this lack of authority does not preclude the Security Council from authorizing a Member State or States to use armed force fulfil the Security Council's peace and security obligation.

Establishment of Peacekeeping

The Charter of the United Nations does not expressly provide for any peacekeeping force or for any particular organ of the UN to establish such a force. As a result, the constitutional basis for the establishment of peacekeeping missions has been hotly debated.[443]

It has become generally accepted that the Security Council has the authority to establish peacekeeping operations although the actual basis for this decision is still not settled.[444] Professors Schachter and Joyner note that the fundamental disagreement in this area of the UN Charter is "over the allocation of authority … among the Security Council, the General Assembly, and the Secretariat, represented by the Secretary-General."[445]

The International Court of Justice had an opportunity to consider these matters in the *Certain Expenses* case.[446]

This case was brought before the Court by the UN General Assembly after a financial crisis developed over payment for the UN's peacekeeping operations in the Middle East and in the Congo. The question for the Court's consideration was whether

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[442] Oscar Schachter & Christopher C. Joyner, eds., *United Nations Legal Order,* vol. 1 (Cambridge, U.K.: Cambridge University Press, 1995) at 281 [Schachter – Legal Order].
[443] *Ibid.* at 292.
[444] *Ibid.* at 294.
[445] *Ibid.*
[446] *Certain Expenses of the United Nations*, Advisory Opinion, [1962] I.C.J. Rep. 151.

these expenditures constituted expenses of the UN within the meaning of Article 17(2) of the UN Charter.

The majority of the court concluded that pursuant to Article 11 and 14 of the UN Charter, the General Assembly has the residual authority to establish peacekeeping operations except where enforcement is required.[447]

In 1965 the Special Committee on Peace-Keeping Operations was established to examine all aspects of peacekeeping and the deliberations of this committee developed an implied understanding that "the Security Council should assume its role as the organ with primary responsibility in the field of peacekeeping to the fullest extent possible."[448]

What has happened at the United Nations is the development of the "living tree" doctrine of constitutional interpretation.[449] This was not only in reaction to the report of this committee but as a result of the UN's recognition of the need of the UN Charter to remain relevant.

Professor Franck discusses this issue in some detail and concludes that the UN Charter has a constitutional character in that it is meant to prevail over subsequent treaties (i.e. Article 103[450]) and that the Charter grants the organs it creates an autochthonous law-making capability – capable of making law. "Most important

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[447] Schachter – Legal Order, *supra* note 442 at 294.
[448] *Ibid.* at 295.
[449] The phrase "living tree" originates in the Canadian case of Edwards v. A.G. Canada [1930] A.C. 124 (P.C.) and, as summarized by Professor Franck Franck, means that a "constituent instrument is capable of organic growth" or grow and adapt with the times to fight obsolescence. Franck, *supra* note 343 at 20-21.
[450] Article 103:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

among its law-generating powers is the institutions capacity to interpret, adapt and implement its own Charter." [451]

The International Court of Justice has confirmed this power in the *Reparations* case when it accepted the doctrine of implied powers and held that the UN did have the capacity to sue in its own right.[452]

This decision arose as a result of the killing of the UN mediator (a Swede) in Palestine in 1948. The UN asked the International Court of Justice for an opinion as to its legal capacity to bring a claim on its own behalf "against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?"[453]

The Court decided that in order to fulfill the organization's aim of international peace and security, it would have to place its agents into harms way. To ensure that an agent would be able to perform their duties they need to feel that there is a certain amount of protection which the UN provides to him/her and that he/she need not rely on the protection of his own state. The Court added that if the UN's agent had to rely upon the protection of his own state then his independence would be compromised which would be contrary to Article 100 of the UN Charter.

As a result of this capacity, the UN has adapted the UN Charter, giving itself a role in the area of collective defence not originally envisaged by the drafters. This new role was peacekeeping.

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[451] Franck, *supra* note 343 at 22-26.
[452] *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 176.
[453] Kindred, *supra* note 161 at 42.

The particular UN Charter Chapter under which the Security Council has established peacekeeping mission is often referred to as Chapter VI ½. As Franck has noted, "[t]his legal fiction is yet another illustration of the Charter's adaption (sic) in practice."[454]

Reference to Chapter VI ½ is often made when looking for the basis for peacekeeping because most peacekeeping missions have not fallen within the rubrics of Chapter VI (pacific measures) or Chapter VII (military measures).

First Generation Peacekeeping – 1948-1990

When Secretary General Hammarskjöld was asked to report to the General Assembly on the organization of the first peacekeeping force[455] he also set out a number of principles which provided the framework for future missions. These principles are:

1. the force will be temporary;
2. the force will be strictly neutral, not changing the military balance between the belligerents but maintain order, supervise ceasefire compliance and observe the execution of UN resolutions;
3. the P-5 nations will not contribute troops to peacekeeping forces;
4 the force commander is appointed by the UN, responsible to the General Assembly of Security Council and be under the immediate supervision of the Secretary General; and
5. the parties which are the subject of the deployment consent to the UN deployment.[456]

These elements are characteristic of what is often referred to a "first generation" peacekeeping. Beginning in 1948 with the UN's first observer mission in Palestine, first

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[454] Franck, *supra* note 343 at 63.
[455] The phrase "peacekeeping force" (lightly armed infantry units with logistical supports) is used to differential this type of mission from an observer mission. Prior to UNEF I (the 1956 Suez crisis force) the UN had placed two observer missions – one in Palestine (1948) and the other in India and Pakistan (1949). As matters evolved hybrids of these types of missions developed, UNAMIR being one such hybrid. Laura Neack, "Multilateral Responses to Risky States: The Case of Peacekeeping" in Gerald Schneider and Patricia A. Weitsman, eds., *Enforcing Cooperation: Risky States and Intergovernmental Management of Conflict* (London, U.K.: MacMillan Press Ltd., 1997) 262 at 264. [Neack].
[456] Peter R. Baehr and Leon Gordenker, *The United Nations in the 1990s*, 2nd ed. (New York: St. Martin's Press, 1994) at 78 [Baehr].

generation peacekeeping has been military in task and composition. As noted by Cedric Thornberry, a former UN Assistant Secretary General, UN peacekeeping missions had usually had as their main objective the freezing of a former conflict situation while a longer-term solution was sought through diplomatic channels.[457]

Between 1948 and 1990 there were 18 UN peacekeeping observer and force missions. These missions have been characterized as being "integral to the West's efforts to maintain a predominantly pro-Western international system"[458] and were primarily within the Middle East (only six were in other parts of the globe). Nine of the ten most frequent participants in these missions were Western nations, including U.S. participation in nine missions, a violation of one of the provisions of the Hammarskjöld code.[459]

The UN was established to prevent or resolve armed conflict between states and as noted by Professor Holsti, the UN Charter is a "Westphalian document *par excellence.*"[460] When confronted with a conflict between two states or between two organized groups characterized by functioning governments and disciplined armies the UN forces or observers perform their mandated function well. As to whether a long-term solution using diplomatic channels is arrived at is a matter beyond the scope of this thesis although considering the length of some of the UN missions, specifically in Cyprus and parts of the Middle East, the UN's grade at resolving the issue may be a

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[457] Cedric Thornberry, "Peacekeepers, Humanitarian Aid and Civil Conflicts" in J. Whitman and D. Pocock, eds., *After Rwanda: The Coordination of United Nations Humanitarian Assistance* (New York: St. Martin's Press, 1996) 226 at 226.
[458] Neack, *supra* note 455 at 265.
[459] Canada participated in 17 of these missions. The other nations included (in ranking order) Sweden (15), Ireland (13), Finland (12), Norway (12), Denmark (11), Italy (11), India (11), US (9), Australia (9). *Ibid.* at 267.
[460] Holsti, *supra* note 432 at 189.

failure. As a minimum, the peacekeeping mission of this period kept the conflict from becoming outright war.

Post Cold-War Peacekeeping – 1990-?

Once the limiting presence of post-Cold War politics was removed from world order, the UN was faced with situations for which it was unprepared.

Since 1990, UN peacekeeping missions have been established in a greater number of regions around the world, have seen more nations provide more troops and have taken on a broader range of tasks than anyone may have envisaged. To successfully meet these requirements and new more encompassing mission mandates, the UN required and requires a new type of soldier. What is required is a soldier who is well trained, well motivated, well equipped and supported by a clearly defined mandate and politicians who will provide the required resources at the soldier's disposal so that they will be able to meet the political objectives of the mission. Failure in any one of these areas spells disaster for not only the soldier on the ground who has placed himself/herself in harms way, but failure of the mandated mission and failure of the UN to meet the expectations which have coalesced around the UN and its place in the world.[461]

[461] The failure by politicians to supply the US forces with specific armaments prior to their attempt at securing the Somali warlord Aideed and his henchmen lead to the unnecessary deaths of civilian and military personnel (as the credible coercive force was missing) and ultimately lead to the American rapid withdrawal from Somalia, the establishment of the Somalia Syndrome, and a Presidential Directive limiting US participation in world affairs. Rwanda's genocide may not have even occurred several months later (or may have happened on a lesser scale) if the right resources had been provided at the right time to the right people. Some have concluded that the wrong lessons were learned from the UNITAF mission in Somalia and "shackled international thinking about internal conflicts like Rwanda, Sierra Leone and Bosnia." Robert G. Patman, ""Beyond 'the Mogadishu Line': Some Australian Lessons for Managing Intra-State Conflict" (2001) 12:1 Small Wars and Insurgencies 59 at 59.

In her review of UN peacekeeping as an effective medium of conflict resolution, Professor Neack concluded that it was an "almost uniform failure".[462] The situation where UN peacekeepers have succeeded was where the parties "have already come to the decision on their own to abandon their risky behaviours and negotiate."[463]

Despite this conclusion, Neack also found that UN peacekeeping missions have become a substitute for political settlement in that they have been used to "tie up risky states[464] indefinitely, thereby limiting their wider ambitions."[465]

Who Should Be Used For Peacekeeping?

UN authorized, organized and deployed peacekeeping missions take three to six months to deploy.[466] Many of the situations to which peacekeeping missions were deployed needed attention within days not months.

Since the end of the Cold War, the UN, individual states and various academic and military writers have considered a number of alternative peacekeeping and peacemaking deployment methods to those which had been accepted in the past. These new initiatives, as outlined by Major General Indar Rikhye (Indian general served as Commander of UNEF and was UN SG Military Advisor 1960-1966) include: the UN Standby Arrangement System (SAS), Rapidly Deployable Missions Headquarters, a UN

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[462] Neack, *supra* note 455 at 281.
[463] *Ibid.*
[464] Risky states have been defined as having one or more of these characteristics: "1. do not abide by conventional and current norms of international community, 2. are perceived to conduct policies which are volatile or uncertain, 3. are situated in a dangerous strategic context such as a rivalry or conflict-prone region and 4. have a propensity to employ force domestically or internationally." Gerald Schneider and Patricia A. Weitsman, "Eliciting Collaboration from Risky States" in Gerald Schneider and Patricia A. Weitsman, eds., *Enforcing Cooperation: Risky States and Intergovernmental Management of Conflict* (London, U.K.: MacMillan Press Ltd., 1997) 3 at 3.
[465] *Ibid.*
[466] Major General Indar Rikhye, *The Politics and Practice of United Nations Peacekeeping: Past, Present and Future* (Clementsport, N.S.: The Canadian Peacekeeping Press, 2000) at 146 [Rikhye].

Standby High Readiness Brigade (SHIRBRIG), the Vanguard Concept,[467] regional forces, *ad hoc* coalitions and/or a combination of these alternatives.[468] Universally, unilateral action by one state is the least preferred method of military intervention.

Rikhye's list of various proposals try to address the deployment principle of "early and in strength" which many military writers espouse as a critical factor in all UN peacekeeping/peacemaking actions.[469] This principle states that once a decision has been made to use military force to prevent or stop ongoing fighting, the military force must be used early in the conflict and with sufficient strength to carry out the mandate of the mission.

In addition to quick reaction to a crisis, Major-General MacInnis (Deputy Commander of the UN Protection Force in the Former Yugoslavia –UNPROFOR [a Canadian]) adds four other principles which must guide a peacekeeping mission including: credible coercive capacity (the right equipment for the mission), conduct in accordance with International Humanitarian Law (IHL) including concern for human rights, a clearly defined military mandate (not "social workers with guns"),[470] and a

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[467] *Ibid.* at 146-147. The Vanguard Concept is a Canadian proposal similar to the SHIRBRIG notion.
[468] Major General John Arch MacInnis, "Preparing Peacekeeping in the 21st Century" in John Norton Moore and Alex Morrison, eds., *Strengthening the United Nations and Enhancing War Prevention* (Durham, N.C.: Carolina Academic Press, 2000) 49 at 58 [MacInnis].
[469] *Ibid.* at 60-61. On 21 March 2003, Brigadier General Gaston Côté, Director of Peacekeeping Policy with Canada's Department of National Defence, confirmed the Canadian rapid deployment policy of 'early in' and 'early out' and ensuring that a strong fighting force is on the ground in a timely manner. Dr. H. Peter Langille and Tania Keefe, "The Future of Peacekeeping: An Experts' Discussion to Contribute to the Dialogue on Foreign Policy" (Report of Workshop Proceedings co-hosted by the Liu Centre for Global Issues et al, 21 March 2003) online: Liu Centre for Global Issues http://www.ligi.ubc.ca/_media/_reports/030602future_of_peacekeeping.pdf at 13 [Langille].
[470] Lewis MacKenzie "Soldiers do force" *The National Post* (13 November 2002) A18. MacKenzie states that this concept has developed "to describe the concept of an all signing and dancing peacekeeper."

definition of humanitarian intervention which includes not only foodstuffs and medicine but, includes belligerent compliance with IHL.[471]

Before conducting a detailed review of two alternatives to the current method of peacekeeping, two of the critical reports with respect to rapid reaction capabilities will be reviewed. After the Canadian and Dutch reports on rapid reaction are considered, the use of regional organizations and rapid reaction forces, will be tested against the four principles (quick reaction, credible capability, IHL conduct, and mandate definition of humanitarian aid beyond foodstuffs) as set out by MacInnis. These two alternatives have been selected as they have already been employed.

Rapid Reaction Reports

The Canadian Report

In 1995, the Canadian government contributed to the discussion on rapid reaction forces in a report entitled, *Towards a Rapid Reaction Capability for the United Nations*.[472]

This report resulted from Canadian reaction to the inability of the UN to act quickly in crisis situations, specifically the 1994 Rwandan genocide.[473] This "inability of the UN to meet reasonable targets of rapid response"[474] was critical in allowing the Rwandan genocide to occur.[475] This report also acknowledged that "the critical lesson

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[471] MacInnis, *supra* note 468 at 58-59.
[472] Canada, *Towards a Rapid Reaction Capability for the United Nations: Report of the Government of Canada* (Ottawa: 1995) [Canada-RRF].
[473] David Cox and Alberta Legault, "Introduction and Summary" in David Cox and Albert Legault, eds., *UN Rapid Reaction Capabilities: Requirements and Prospects* (Clementsport, N.S.: The Canadian Peacekeeping Press, 1995) 1 at 1.
[474] Canada-RRF, *supra* note 472 at 2.
[475] The Carnegie Commission of Preventing Deadly Conflict concluded that in mid-April, 1994 there had been a two week time period "during which time a preventive deployment could have been successful in halting Rwanda's genocide." ICISS *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa, ON: International Development Research Centre, 2001) at 187 [ICISS].

of the Rwandan experience is that modest but timely measures can make the difference between a situation which is stable or contained and a humanitarian disaster which has spiralled (sic) beyond control."[476] What is particularly telling about the political nature of this report is its reference to the Rwandan genocide as an "experience". By acknowledging the Rwanda 1994 genocide as a genocide it would trigger obligations pursuant to the Genocide Convention.

The report added that by the UN having this capability it would help "the search for international peace and stability" and provide the Security Council with the means of not only responding to situations, but would "encourage responsible, prudent decision-making within the Council itself".[477]

With contributions from the military, governmental officials and academia, this report resulted in some 26 recommendations. The recommendations were made within the parameters of four principles – reliability, quality, effectiveness, and cost-effectiveness.

The recommendations, made for short, medium and long term timelines, included making improvements to the UN system of reacting to crises by improving and increasing the financing of UN peace operation and the development and refinement of early warning capabilities.

Particularly relevant to the thesis were recommendations with respect to increasing the support from Member States to the UN by way of personnel (military and civilian) and materiel to allow for a more rapid UN response to a crisis.[478] This rapid

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[476] Canada-RRF, *supra* note 472 at 3.
[477] *Ibid.* at 7.
[478] *Ibid.* at 67-71.

reaction ability, developed through a vanguard concept (recommendation #18), would link the personnel from Member States with the operational-level headquarters through the standby arrangements system.[479] Critical to the success of this vanguard concept were capable and multi-functional personnel. These personnel were to be made available as a result of the development of training and equipment guidelines for the national units that are to deploy under operational control of the UN.[480] The standby arrangements system was the core of this approach.

The report concluded that the UN does not require a large scale force but that any UN rapid-reaction force must consider the following:

1. flexibility – to deploy in and deal with situations ranging from humanitarian assistance to high risk operations;
2. modular in structure and capability – to organize themselves in accordance with the particular mission;
3. mobility – the ability of the forces to be moved quickly from home stations to where they are required;
4. high degree of readiness – the force having the ability to move its personnel and materiel quickly and be able to "immediately upon debarcation" to conduct the operations for which it was deployed; and
5. self-sufficiency – have all the elements "to support and sustain itself for the initial stages of the operation".[481]

The report also lists six generic components fundamental to a rapid-reaction forces' success including:

1. an early warning mechanism providing "advance notice of impeding conflict or crisis";
2. timely decision-making;
3. lift capacity to move the force and an awareness of the infrastructure in the theatre of operations;
4. sufficient logistics support for the force to be self-sufficient during the initial period of the crisis;
5. adequate finances to fully fund the rapid-reaction force; and

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[479] *Ibid.* at 52.
[480] *Ibid.*
[481] *Ibid.* at 21.

6. well-trained personnel who are trained and equipped for high-risk situations.[482]

One of the limiting factors in the efficacy of the type of force recommended by this report is that "UN units would not be expected to go into combat situations or into operations in which they would be called upon explicitly to use force against an aggressor."[483] Although a rapid-reaction force with this mandate may have some limited use during preventive operational situations, however, on the current world stage, a force limited in its terms of reference will serve little purpose except as a ineffective speed bump as the belligerents lock horns.

The report's explanation for this limitation is that by reducing the force's objective it also reduces the number of personnel required, requires different equipment and reduced levels of transportation and logistical support.

This plan provides a less robust presence than that which has characterized many current UN and non-UN sponsored and staffed missions.

Along with the difficulties noted in the areas of early warning, decision-making, transportation, logistics and finance, the fundamental problem which this study identifies is the lack of well-trained personnel. As noted in the report, "the core of a rapid-reaction capability is well-trained, adequately-equipped personnel."[484] To be effective, a rapid-reaction force needs to able to deploy immediately and does not have the time to conduct pre-deployment and mission-specific training. Even the militaries of Canada and the United States still conduct pre-deployment and mission-specific

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[482] *Ibid.* at 21-23.
[483] *Ibid.* at 24.
[484] *Ibid.* at 33.

training for a non-conflict environment such as the NATO mission in Bosnia-Herzegovina despite almost a decade of collective experience and a environment.[485]

Professor H. Peter Langille, noted that the recommendations of this study "were refined to appeal to a broad range of supportive member states" and noted that to meet the recommendations of this Canadian study, UN Charter reforms would be unnecessary and no additional expenses would be incurred by the UN.[486]

Project Ploughshares considered that the "centerpiece" of this Canadian report was the creation of a peacekeeping vanguard force, which could be deployed within three to five weeks of a decision to begin a UN operation.[487] Robinson noted that the main elements of the vanguard proposal included:

1. use of improved standby arrangements to create a multi-national vanguard force of up to 5,000 well-trained, well-equipped personnel being able to be deployed quickly to react to an immediate crisis or to await the arrival of a more traditional peacekeeping force;
2. the creation of a permanent UN operational headquarters to command the vanguard force and conduct training and contingency planning;
3. the development of improved capability to conduct advanced planning and better integration of early warning information about potential crises; and
4. better procedures for advance consultation and rapid decision-making by the UN and contributing nations.

The Ploughshares article also identifies one of the shortcomings (in the view of this writer) of the Canadian proposal in that UN units would not be expected to "'be

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[485] Based upon the writer's personal knowledge and participation in the development of pre-deployment training for Bosnia-Herzegovina.

[486] H. Peter Langille, "Conflict Prevention: Options for Rapid Deployment and UN Standing Forces" online: Global Policy www.globalpolicy.org/security/peacekpg/reform/canada2/htm at 5 {Langille-Conflict]. Peter Langille was a member of the Core Group of the Canadian study.

[487] Bill Robinson, "Canada's Rapid Reaction Proposal: The New Vanguard of Peacekeeping?" December 1995 Ploughshares Monitor 13 online: Project Ploughshares http://www.ploughshares.ca/content/MONITOR/mond95c.html at 1 [Ploughshares].

called upon explicitly to use force against an aggressor.'"[488] This position has proved fatal to peacekeepers and their mission as well as the civilian victims as noted elsewhere in Parts 3 and 4 of this thesis.

Robinson regards the major weakness of this Canadian report on rapid reaction forces as being the report's "failure to place peacekeeping in the broader context of peacebuilding – the full range of international efforts to prevent or end conflicts in war-torn or war-threatened societies – and longer-term common security measures."[489]

The Ploughshares article underlines the critical point that it would be a mistake to place too much of the world's focus upon the process of peacekeeping as opposed to ensuring the focus remains on peacebuilding. Peacekeeping is an element of peacebuilding and as pointed out by Robinson, the danger is that peacekeeping will continue to "absorb an excessive part of the UN's very limited budget and, at the same time, bias decisionmaking (sic) towards the dispatch of troops and away from other forms of non-military intervention – many of which could begin much earlier – to prevent or defuse crises."[490] Robinson ends this discussion by adding that the Canadian proposal "would be improved if it were situated more firmly within this broader policy context" and concluded that there were limited prospects of the Canadian proposal reaching fruition although some progress would be made as some of the Canadian recommendations were already underway.

As to the establishment of a vanguard force, Robinson noted that although this recommendation may move the UN towards a more rapid reaction to conflict situations,

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[488] *Ibid.* at 2.
[489] *Ibid.* at 2-3.
[490] *Ibid.* at 3.

concerns over the high cost of peacekeeping and "excessive UN intervention in 'domestic' affairs" would work against this force's establishment.[491]

The Netherlands Non-Paper

In 1994, the Dutch government assembled a team of experts to conduct a study and then convened a conference to consider the initial study. The result of these consultations was the conclusion that the critical shortcoming in the UN peacekeeping system was the lack of instantly deployable units which could contain a developing conflict situation.[492]

This non-paper suggested that an alternative was needed to the UN Standby Arrangements System (SAS). The alternative was a "permanent, rapidly deployable brigade that would guarantee the immediately availability of troops when they were urgently needed" and would complement the existing systems in place as it would be used between the time of a Security Council decision to intervene and the arrival of an international peacekeeping force.[493] Langille also noted that it was recommended that this brigade had the additional tasks of serving as a preventive force and be available to deploy into emergency humanitarian situations.

The annual cost of this 5,000 person force was estimated to be US $300 million with some US$500-550 million for the initial procurement of equipment.[494]

Dr. Langille concluded that although this paper stimulated discussion, "it was clear … that only a less binding, less ambitious arrangement would be acceptable" and

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[491] *Ibid.* at 3.
[492] Langille-Conflict, *supra* note 486 at 4.
[493] *Ibid.*
[494] *Ibid.*

that the majority of nations opposed any standing UN force and "even the modest expenditures outlined."[495]

Regional and Sub-Regional Forces

UN Charter Provisions

Regional organizations and arrangements are referred to in Chapter VIII of the UN Charter.

Nothing in the UN Charter precludes regional arrangements or agencies being established for the purposes of "dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action..." as long as the activities of these agencies are "consistent with the Purposes and Principles of the United Nations."[496]

Some commentators have suggested that as the UN faces continuing limits on its ability to mount peacekeeping and peacemaking operations it must increasingly turn to regional and sub-regional agents to meet the Purposes and Principles set out in the UN Charter.

Major Godwin, an American Judge Advocate General, suggests that there are at least four major reasons for the practical shortcomings of the UN as a peacekeeping/peacemaking force. These limitations are: firstly, the P-5 veto power (which continues to be used regularly even during the post-Cold War era), secondly, the lack of properly equipped soldiers and logistics, thirdly, the lack of finances as a result of continuing disagreements with major Member states, and lastly, the lack of

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[495] *Ibid.*
[496] UN Charter paragraph 52(1). Kindred - Documents, *supra* note 344 at 11.

"necessary command, control, and logistics framework necessary to direct large-scale interventions."[497]

In a similar vein, writing more than 30 years earlier, a Swede, Major General Carl von Horn (commander of UN missions in Palestine, the Congo and Yemen), wrote that unfortunately, UN missions are not an army and as a result have limitations. He wrote "… we were a United Nations force in which logic, military principles – even common sense – took a second place to political factors."[498] Based upon current news reports, little has changed.

There are three hurdles which a regional or a sub-regional organization must vault prior to its action being considered to be within the provisions of the UN Charter. These three hurdles are:

1. it must be a regional arrangement (no definition is provided as to how "regional" is to be determined);
2. the organization must be able to deal with matters of international peace and security pursuant to its own charter documents or has incorporated various international treaties or protocols into its charter; and
3. it must have a direct relation to the region where it is maintaining international peace and security.

For sub-regional organizations a fourth element is added – that it must comply with the provisions of the regional organization.[499] As a result, a sub-regional organization such as ECOWAS must comply with the charter of the African Union or

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[497] Godwin, *supra* note 432 at 15-20.
[498] Major-General Carl von Horn, *Soldiering for Peace* (London, U.K.: Cassell & Company Ltd., 1966) at 146. [von Horn]. von Horn explains in great detail many of the trials the balancing act played by the military in balancing the needs of the UN and local politicians, leaders of countries bordering the nation which is subject of a UN mission (who often have their own agendas and are prepared to offer military force to meet those personal objectives) and the mission.
[499] Godwin, *supra* note 432 at 47.

the Organization of Eastern Caribbean States with the Organization of American States' charter.

Although a regional organization does not need UN Security Council authorization to attempt peaceful resolution of disputes, Article 53(1) of the UN Charter does require UN Security Council authorization for enforcement action.[500] Pursuant to Article 53, a regional organization may take action:

1. in self-defence;
2. when it is has prior UN Security Council sanction; and
3. when its peacekeeping action is performed with the full consent of its members and in accordance with the UN Charter.[501]

Another condition precedent for a regional organization to begin a maintenance of international peace and security operation is to "make every effort to achieve pacific settlement of local disputes".[502]

Despite these seemingly clear provisions, there is no agreement as to the limits which have been placed upon regional organizations by the Chapter VIII of the UN Charter.

The debate as to what action a regional organization can or cannot take ranges from a narrow interpretation of Article 52 (pacific means or if enforcement then self-defence or UN Security Council authorization only) to the position that regional organizations may use force against any other nation as long as it does so in conformity with the purposes and principles of the UN Charter.[503]

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[500] Pursuant to paragraph 53(1), the UN "Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority."
[501] T. Modibo Ocran, "The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping" (2002) 25 B.C. Int'l & Comp. L. Rev. 1 at 41 [Ocran].
[502] Kindred Documents, *supra* note 344 at 11.
[503] Godwin, *supra* note 432 at 35.

The first test of the effectiveness of a regional organization in peacekeeping was the OAS's action in The Dominican Republic in 1965. What initially began as an American intervention to rescue its citizens eventually became a Inter-American Peace Force after the OAS's decision to internationalize the American peacekeeping force already in place.[504] This internationalization was completed within a few weeks and completed without UN Security Council approval.[505] After elections were held in June 1966, all forces were withdrawn by September 1966. Throughout the period of the OAS's involvement the UN attempts to become involved met with limited success.

The OAS relied upon the Chapter VIII provisions of the UN Charter for this action, maintained its neutrality and limited its use of force to self-defence. The US and the OAS emphasized that this was not an enforcement action and the international community did not rebut this assertion.[506]

Advantages to Peacekeeping by Regional Organizations

Professor Francis suggests that regional intergovernmental collective security organizations such as ECOMOG be used.[507] Francis cites three advantages which regional forces have over other types of forces. These advantages are: one, being from the region, they are presumed to better understand the conflict, two, more politically acceptable to the warring factions and three, their proximity makes it easier for troop deployment and logistics. He adds that organizations such as ECOMOG have proven

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[504] *Ibid.* at 38-39.
[505] *Ibid.*
[506] *Ibid.*
[507] David J. Francis, "Mercenary intervention in Sierra Leone: providing national security of international exploitation" (1999) 20:2 Third World Quarterly 319 at 335-336 [Francis].

their worth in countries such as Liberia and Sierra Leone as helping to enforce law and order and serving as good conflict managers.[508]

Professor Howe lists four similar political and military advantages which regional or subregional forces have or should have and which are often cited by supporters of this means of peacekeeping/peacemaking. These are: acceptance, knowledge, commitment, and military suitability.[509]

Failure of Regional Organizations

To answer the proponents of regional forces, Prof. Howe reviews each of his four points in light of the ECOMOG's attempt at peacekeeping in Liberia. His conclusion was that ECOMOG's efforts failed.[510] Their efforts failed because the mission had inadequate resources, did not enjoy wide political support, the ECOMOG mandate and military capabilities were ineffective, and, in an understatement, Howe adds that "its commitment to remain had some destabilizing effects".[511]

The four areas where regional forces should have advantageous over other forces will be briefly examined in the context of what Prof. Howe and others have found.

To properly place the ECOMOG failures into context, Howe briefly touches on the many political considerations which first went into the establishment of

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[508] Other authors have congratulated ECOWAS for organizing the ECOMOG effort in Liberia despite the intervention not complying with the provisions of the UN Charter as it was not a Security Council-authorized intervention. Ocran, *supra* note 511 at 41-42.
[509] Howe – ECOMOG, *supra* note 83 at 160.
[510] See Jennifer Morrison Taw and Andrew Grant-Thomas, "U.S. Support for Regional Complex Contingency Operations: Lessons from ECOMOG" (1999) 22 Studies in Conflict and Terrorism 53 who conclude that despite many shortcomings, this deployment remained committed to and met some of the objectives of the mandates mission.
[511] *Ibid.* at 176.

ECOWAS[512] and secondly those which went into the establishment of ECOMOG. Although ECOWAS was intended to encourage economic cooperation among it members, members of ECOWAS felt that the Liberian war would increase the flow of refugees and political instability in the area and that this would further negatively impact upon increasing investment in this African region.

ECOMOG was established by default in August 1990. It was established by default because the United States was not interested in supporting the Liberian government and the UN and the Organization of African Unity (OAU) were not going to interfere without the invitation of the involved parties.[513]

There remain some questions as to whether or not the test set out in Article 52 of the UN Charter was met by ECOWAS. Although ECOWAS was a regional organization and had a connection to the area where it was intervening, there remained the question as to whether ECOWAS's charter provided for a peace and security function of the sort which developed with the establishment of ECOMOG.[514]

The second area of concern was that the stated purpose was for humanitarian grounds with no claim of self-defence or consent.

The evidence reveals that the stated motive may have been one of several and certainly not the most important motive. Quoting Chike Akabogu, a Nigerian

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[512] ECOWAS – the Economic Community of West African States was founded in 1976 and was the only organization which included all 16 of the region's states. These included nine Francophone states (Cote d"Ivoire, and Burkina Faso) five Anglophone states (Nigeria and Ghana) and two Portugese-speaking states (Republic of Cabo Verde). Today there are fifteen members. The mission of this regional organization was and is economic. *Ibid.* at 150.

[513] *Ibid.* at 151.

[514] ECOWAS's charter document "did permit member states to provide mutual assistance if an internal conflict supported and engineered from the 'outside' appeared likely to endanger the peace and security of " ECOWAS, however, the ambiguity of the meaning of outside raised some questions. As suggested by Major Godwin, did this mean from outside the region or outside the country (the is evidence that Cote d'Ivoire, a member of ECOWAS supported Charles Taylor and his cabal). Godwin, *supra* note 432 at 50.

journalist, Howe suggests that ECOWAS's motive for establishing military force for the first time was that this "would strengthen a largely moribund ECOWAS and create a precedent of regional cooperation that the rest of Africa could follow."[515] The Francophone members of ECOWAS saw the establishment of ECOMOG and its deployment in Liberia as an "Anglophone road show" and viewed it as a furthering of the Anglophone influence in the area, primarily being carried out by Nigeria.[516] The francophone nations' opposition to ECOMOG's deployment was such that they supported Charles Taylor and his bands of armed men and children to the detriment and in opposition to the efforts of the regional organization of which they were members.[517]

After a detailed account of the different participants and their politico-military structure, Howe returns to his analysis of the four rubrics.

Political acceptance

In answering the question as to whether Africans will accept other African peacekeepers more willingly than non-Africans peacekeepers, Prof. Howe replies in the negative because these forces often introduce serious problems. Four problems are readily discernable in ECOMOG's deployment: historical differences, conflicting aims, non-democratic political backgrounds of participants and forces' conduct.[518]

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[515] *Ibid.* at 152.

[516] Rasheed Draman and David Carment, "Managing Chaos in the West African Sub-Region: Assessing the Role of ECOMOG in Liberia" (2001) [unpublished archived at The Norman Patterson School of International Affairs, Carleton University] online: Carleton University http://www.carleton.ca/csds/publications/NPSIA-26.PDF.

[517] Howe – ECOMOG, *supra* note 83 at 153.

[518] The Nigerian police, army, air force and navy personnel have been used against their own people. IN April, 1994, Ken Wiwa, describes how a combined force of Nigerian soldiers and police descended upon the province of Ogoni, "massacring more than eight hundred men, women and children and destroying six villages. A Catholic nun … wrote that 'the military are busy flattening anything left standing in the six villages and are taking up residence there to eat the goats and crops.'" Ken Wiwa, *In the Shadow of a Saint* (Toronto: Alfred A. Knopf Canada, 2000) at 112 [Wiwa]. Okonta and Douglas cite Human Rights Watch interviews with Nigerian soldiers (one of whom recalled from the ECOMOG forces in Liberia)

The introduction of existing political tensions among ECOWAS members is based on francophone-anglophone historical differences which played out on the field of operations causing disruption and loss of military lives.[519] The "national aims of the contributing states may collide with those of the subregional forces" with the result that the efficiency of the field units is reduced with increases in tension among the participating states.[520] The forces' legitimacy in securing its mandate, which included "restoring law and order to create the necessary conditions for free and fair elections to be held in Liberia,"[521] was a novel concept for most the military members as few of the ECOMOG governments were themselves democratically elected. Three of the five nations who were the prime actors in ECOMOG were run by military dictators who overthrew democratically elected governments.[522]

Few of the represented nations favoured much domestic dissent.[523] Howe also found that ECOMOG's use and encouragement of local factions offered some military

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who were told that they were repelling a 1993 Cameroon attack only to discover that they were firing upon unarmed Ogono villagers. Ike Okonta and Oronton Douglas, *Where Vultures Feast: Shell, Human Rights and Oil in the Niger Delta,* (San Francisco: Sierra Club Books, 2001) at 125 [Okonta].

[519] During a major offensive operation, against the forces of Charles Taylor, while the Nigerian and Sierra Leonean forces were fighting, the Francophone members of ECOMOG chose to resist these efforts. *Ibid.* at 161.

[520] Examples of this issue include when the Nigerians pushed for the removal of a Ghanian general who commanded ECOMOG after first agreeing to a Ghanian being in command of ECOMOG. He was replaced by a Nigerian. Another incident happened during the initial ECOMOG landing in Liberia when the Guineans, without notifying the ECOMOG headquarters, decided to leave their position in the ECOMOG front line to liberate their embassy. Taylor's forces surrounded them and the Guineans had to be rescued by Ghanian forces with losses to the rescuing force. Disregarding the common pooling policy, the Ghanian battalion arrived with a well stocked mobile hospital and yet only Ghanians "were being given attention in terms of surgery." *Ibid.* at 161-162.

[521] *Ibid.* at 151-152. The EMOMOG soldiers would have a difficult time understanding the mandate given the actions taken in their own countries. In 1993, when it was clear that Chief Moshood Abiola won an election in Nigeria, the ruling president, General Babangida, annulled the elections. This action ultimately led to General Sani Abacha seizing power a few months later. Wiwa, *supra* note 518 at 105.

[522] Anthony Chukwuka Ofodile, "The Legality of ECOWAS Intervention in Liberia" (1994-95) 32 Colum. J. Transnat'l L. 381 at 399 [Ofodile].

[523] There is scant evidence to indicate that this condition has changed since ECOMOG's efforts between 1990 and 1996. During the September, 2002 revolt in Côte d'Ivoire, The Economist reported that most opposition newspapers had stopped publishing "after the Ministry of Information gave warning that it

advantages, however, lost ECOMOG the goodwill gained in the earlier freeing of Monrovia. Tying this with the widespread corruption and high handedness shown by all elements of ECOMOG, this sub-regional force lost the support one would expect an African forces would receive from the Africans they have come to rescue. When, later in the ECOMOG mandate, the UN did become involved, several UN mission officials "complained that ECOMOG did not want UNOMIL [United Nations Observer Mission in Liberia] observing activities relating to arms flows, human rights abuses, and food shipments."[524]

Greater Knowledge

In 1993, the U.S. and other nations discovered in their mission to Somalia that their limited knowledge of the developing world could be fatal not only to their military but also to their mission. Unfortunately, ECOMOG's deployment into a neighbour's backyard proved that despite geographic proximity, they had surprisingly little knowledge about Liberia.[525]

The ECOMOG forces had little understanding of Taylor's organization, its capabilities and his motivation. ECOWAS had underestimated the willingness of the francophone members of its organization and private businesses to assist Taylor and thereby prolonging the conflict.[526] Until the U.S. provided ECOMOG with topographic

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could not guarantee their security if they published 'articles embarrassing to the state'". The former military ruler, Robert Guei, was reported by the government to have been killed while on his way to a television station to proclaim himself president again, however, being found on the street in a t-shirt and jogging pants with a bullet hole in the side of his head, suggests otherwise. "Coups, stratagems and spoils: Côte d'Ivoire's mutiny" *The Economist* (28 September – 4 October 2002) 42.

[524] Howe – ECOMOG, *supra* note 83 at 163.

[525] *Ibid.* at 164.

[526] *Ibid.*

maps of Liberia, their forces used a tourist map of Monrovia during initial deployment planning.

Commitment

A fundamental aspect of this element is the belief that a regional or sub-regional force "may exhibit greater resolve toward solving the conflict."[527]

ECOMOG's record is poor. Although acknowledging the commitment of West African governments to maintaining a military presence in Liberia, (beyond commitments which, after Somalia, no Western nation would make) Howe suggests that ECOMOG's altering of its strategy during the deployment resulted in an even longer struggle between the warring factions.

After losing some 700 peacekeepers, ECOMOG remained in Liberia by lessening its involvement and aiding the factions which prolonged the war and the looting. By not pressing its early military advantage over Taylor's forces and then not venturing outside the capital city, ECOMOG allowed Taylor to recover from his earlier defeats and continued his looting of the Liberian countryside.[528]

Abuse of human rights became the norm of the factions supported by ECOMOG because those factions which did show resolve to fight Taylor, were given *carte blache* in their everyday operations.[529]

Changing politics within the states contributing forces to a regional force may also alter the mandate as evidenced by change in the type of ECOMOG commander. Nigerian generals commanding ECOMOG were regularly changed by the Nigerian

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[527] *Ibid.* at 165.
[528] *Ibid.* at 1645-166.
[529] *Ibid.*

government, vacillating between aggressive commanders who pressed the war with the resultant increase in casualties and those more passive who maintained the status quo and yet prolonged the conflict.[530]

Suitability of Military Capabilities[531]

If the military personnel and materiel were well-suited for the terrain, had adequate intelligence capacity and a strong strategic sense then the lower costs (primarily as a result of lower pay) associated with regional forces may be a suitable alternative to other peacekeeping options.

Prof. Howe examined this criteria and found the ECOMOG national forces wanting. They "lacked much of the equipment, maintenance, manpower, administration and intelligence required for counterinsurgency in Liberia."[532]

The individual states had military hardware, however, to fight the kind of war required of it in Liberia, ECOMOG needed to replace tanks, suitable for Europe, with helicopters and spotter aircraft. These were in short supply (in mid-1995 only the commander's helicopter was available).[533] Although individual states had a number of helicopters in their state armouries, their inadequate maintenance made them unavailable for deployment to Liberia.

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[530] *Ibid.* at 167.

[531] An important element in the maintenance of a capable military force is the ethos which it brings to a mission. The ECOMOG force reflected the existing ethos of the nations which contributed its members and their record does not stand before close scrutiny. "[D]uring the decades of military rule, the Nigerian armed forces have lost nearly all semblance of professionalism and become thoroughly corrupted. Senior officers all become immensely rich through theft, while junior officers and enlisted men live in poverty." *Ibid.* at 171.

[532] *Ibid.* at 167.

[533] *Ibid.*

Communications and the incompatibility of equipment hampered the force's efforts because the various nations attended the battlefield with a mix of Western and former Soviet bloc equipment.[534]

Critical to the success of any armed formation is the logistical tail which accompanies the "tooth" element of a military force. ECOMOG's logistical planning unit did not have any logistical officers.

Junior officers in the Nigerian and Sierra Leonean forces often did not receive pay for several months at a time. As a result, soldiers often resorted to black marketeering and theft from humanitarian relief shipments to sustain themselves.[535] The peacekeeper crime wave drained and/or diverted resources and alienated the previously welcoming Liberians.

The lack of intelligence resulted in ECOMOG planes accidentally hitting relief convoys and medical facilities which mistakes lead to limitations on the use of their air superiority.[536]

It is clear that throughout the entire continuum of ECOMOG's establishment and operation, this regional peacekeeping force was not part of the solution, but, prolonged the conflict.

Professor Howe concludes his remarks by adding that "a weak subregional organization can create only a weak military force."[537] The result from the use of this regional peacekeeping force was increased instability in the region. The protracted conflict in Liberia encouraged spill over of the conflict by Taylor into Sierra Leone, the

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[534] *Ibid.*
[535] *Ibid.* at 169.
[536] *Ibid.* at 170.
[537] *Ibid.* at 171.

toppling of the Gambian government, and an increase of refugees into bordering nations.

Dr. Funmi Olonisakin's review of the ECOMOG deployment in Liberia (and an earlier OAU mission in Chad) reached many of the same conclusions. She notes that there were several factors which prevented ECOMOG being able to stop the Liberian conflict including:

1. the lack of preparedness of the forces for the multifaceted military roles which the force members were asked to perform;
2. the role which politics played in selecting officers to vital roles in the force;
3. the lack of political involvement (i.e. no special representative appointed to negotiate with the belligerents);
4. the differences in fighting capability of troops from different countries and even within a country's own armed forces;
5. failure to meet logistics requirements of the force;
6. financial constraints and poor planning;
7. the Nigerian military's involvement in Nigerian politics weakened it military professionalism and lead to the appointment of officers on "the basis of loyalty rather than competence"; and
8. the force's neutrality and impartiality was often compromised (Nigerian soldiers were deployed to Liberia without uniforms and boots and as a result, "soldiers were forced to receive uniforms and boots as gifts from the leader of one of the warring factions – the INPFL" leading to claims of impartiality).[538]

Dr. Olonisakin concludes her review of African capabities by stating that this situation has shown that militaries are expected to perform duties beyond both the traditional peacekeeping model and normal combat capabilities. For militaries to perform these multifaceted duties they are expected to have the resources to meet these roles handed to militaries by politicians and diplomats.

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[538] Funmi Olonisakin, "African 'Homemade' Peacekeeping Initiatives" (1997) 23:3 Armed Forces and Society 349 at 363-368. [Olonisakin].

African militaries "do not have the resources to embark on normal peacekeeping ventures, let alone such complex ones as those required to deal swiftly with conflict situations like Liberia."[539] In answering the suggestions that subregional powers are being looked upon to bear increased responsibilities, she suggests that where no clear regional power is in place (Central and East Africa) "tragedies like Rwanda are sadly unavoidable" and even if there is a regional power in place, "domestic problems have almost crippled the ability of those states to respond to crises in their backyard."[540] Her paper ends with the statement that "unless accountable African governments emerge, the UN and the Western world are likely to be saddled with the material cost of African peacemaking efforts for the foreseeable future."[541]

Professor Mulikita critically assessed the potential of the Organization of African Unity's (OAU) role as an agent of conflict resolution and peacekeeping in Africa and found not only the past performance wanting, but future prospects limited. He concluded that the OAU could not live up to the performance of the Organization of Security and Cooperation (OSCE) completing the same function in Europe.[542]

He suggests that there are a number of reasons for this including: first, African power brokers belief in the use of repression "to settle essentially political problems", second, the use of the OAU to discredit their opponents and prolong regimes who are friendly to them even after those regimes having "lost the moral authority to exercise

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[539] *Ibid.* at 369.
[540] *Ibid.*
[541] *Ibid.*
[542] Dr. Njunga Michael Mulikita, "The Peacekeeping Profile of the Organization of African Unity (OAU): A Critical Assessment" (1998) 27:6 Peacekeeping and International Relations 6 at 6 [Mulikita].

legitimate political governance" and the promotion of different African agendas by the U.S., France and Britain.[543]

Legal Basis for Chapter VIII Intervention

Professor Ofodile concluded that the ECOMOG intervention in Liberia "[did] not have any solid anchor in international law."[544] His conclusion was based upon the following:

1. the ECOWAS Charter "did not empower the organization to involve itself in matters of peace and security" as its aim was the economic development of the region;
2. although ECOWAS adopted a protocols relating to non-aggression and mutual assistance on defence, neither of these agreements authorized intervention when the conflict originated within a member or if the conflict was supported by a member;
3. ECOWAS did not have the right to make a peace and international security determination. Under the UN Charter they have the right to bring a matter to the UN Security Council's attention and if they feel that that body is reacting too slowly may ask for authorization to intervene;
4. the ECOMOG deployment could have been legal if it had remained a peacekeeping mission – complying with the consent requirements, however, the consent was not received from all the belligerents;
5. ECOMOG did not limit itself to ordinary peacekeeping and the provision of humanitarian aid because it attempted to determine the outcome of the civil war; and
6. the later endorsement, first by the UN Secretary General and then by the UN Security Council did not validate it action.[545]

Evaluation

To conclude this examination of the regional military force ECOMOG the four MacInnis criteria will be applied to their deployments in Liberia and Sierra Leone.

When evaluated against the "early in" provision, ECOMOG's deployment into Liberia is a failure. Although the decision of the ECOWAS Standing Mediation

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[543] *Ibid.* at 10 and 6.
[544] Ofodile, *supra* note 522 at 418.
[545] Ofodile, *supra* note 522 at 409-415.

Committee was made on 7 August 1990 to deploy troops to Liberia and they fought their way into Monrovia on 24 August 1990, the fact that they had to fight their way into the country and that it was evident in June 1990 that "the fighting was of a most savage nature" as both Liberian and foreign civilians were being targeted and killed indiscriminately[546] indicate that although the initial force of 3,000 soldiers arrived relatively quickly once authorization was granted, they missed the "early in" requirement of arriving early to prevent suffering.

As evidence of ECOMOG's failure to have a "credible coercive capacity" (the second MacInnis point), General Khobe's observation that "ECOWAS member states lack the economic resources to sustain the kind of large-scale military operations that are dictated by situations on the ground"[547] deals with the issue of the lack of resources in a more general manner. As additional evidence of this lack of capacity to intimidate the belligerents into submission is the fact that the conflict continued for an extended period of time, failed to provide a lasting settlement and as early as October 1992 Charles Taylor and his NPFL showed their disdain for ECOMOG's abilities by launching Operation Octopus, a surprise attack against Monrovia and the predominantly ECOMOG force defending it.[548]

Evidence is also available to confirm that ECOMOG failed in complying with MacInnis "conduct in accordance with international humanitarian law" provision.

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[546] Mitikishe Maxwell Khobe, "The Evolution and Conduct of ECOMOG Operations in West Africa" in ISS, *Boundaries of Peace Support* Operations (February 2000) online: Institute for Strategic Studies www.iss.co.za/Pubs/Monographs/No44/ECOMOG.html at 2-3. General Khobe provides a more positive evaluation of ECOMOG's mission success in Liberia written why he was a Nigerian officer serving as the Chief of Defence Staff, Republic of Sierra Leone. Before his 2000 posting in Sierra Leone, he had served as the ECOMOG force commander in Sierra Leone.

[547] *Ibid.* at 3.

[548] Christopher Tuck, "'Every Car Or Moving Object Gone' the ECOMOG Intervention in Liberia" 4(1):1 African Studies Quarterly online: African Studies Quarterly http://80-web.africa.ufl.edu.login.ezproxy.library.ualberta.ca/asq/v4/v4i1a1.htm at 7 [Tuck].

During a press conference on 20 January 1999, Lieutenant General Arnold Quainoo (the first ECOMOG Commander in Liberia) admitted that ECOMOG troops in Liberia had sold arms to the various factions[549] and the 23 July 2003 testimony of Dr. Julius Spencer before the Sierra Leone Truth and Reconciliation Commission revealed that a Nigerian officer, nicknamed Captain Evil Spirit was involved in the killing of civilians who had been identified by other civilians as rebels without trial.

Although the ECOMOG mandate often lacked clarity and changed during the course of its mission, it did include a greater humanitarian intervention than providing for the essentials (the fourth MacInnis test). Despite elections eventually being held in Liberia, it is difficult to agree that ECOMOG restored "law and order to create the necessary conditions for free and fair elections to be held in Liberia."[550]

By using the MacInnis test our evaluation of the use of this regional force and it could be argued, of many other non-western regional forces are destined to fail. When the several years of the ECOMOG mission in Liberia and its subsequent mission in Sierra Leone are considered we note that regional forces are destined to fail for a number of reasons, the most significant one is as stated by a General Khobe. More importantly, they fail the citizens of not only the nation to where they are sent but they also fail us all in that we believe that a tragedy is being attended to and solved when it is far from resolution.

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[549] Gibril Gbanabome "ECOMOG Sold Weapons to Rebels: Arnold Quainoo" online: The Independent http://www.nisat.org/west%20africa/news%20from%20the%20region/ecomog_sold_weapons_to_rebels_ar.htm at 1.

[550] Tuck, *supra* note 548 at 5.

Professor Dorn emphatically concludes that regional peacekeeping is "a bad idea."[551] To justify his conclusion, he not only looks to ECOWAS's failures but includes examples of failed regional peacekeeping missions in which the Commonwealth of Independent States/Russian were involved in Georgia, the Indian peacekeeping in Sri Lanka and the Organization of American States (OAS) efforts in Central America. He justifies his conclusion based on several reasons including: that impartial peacekeeping is impossible because of harmful self-interests and personal allegiances between leaders, regional organizations tend to be dominated by one power or as "some would say bully" (Nigeria – ECOWAS, U.S. – OAS), outside of NATO no other regional organization has the capacity to be involved in sustained peacekeeping operations, and that the UN has the moral authority to be a global force but that there exists a danger of "siphoning off some of the attention, resources and finances [from]... important UN initiatives" to regional organizations which would dilute the more important global initiatives."[552]

Rapid Reaction Force (RRF)

Since the establishment of the UN, a number of different types of rapid reaction forces have been advocated including the establishment of a UN army.[553]

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[551] Walter Dorn, "Regional Peacekeeping is Not the Way" (1998) 27:4-5 Peacekeeping and International Relations 1 at 1 [Dorn].

[552] *Ibid.* at 1 and 3.

[553] Discussion of a standing UN army is almost as old as the UN. Some of the unresolved issues which obviate the establishment of a UN army include: nations resisting participation where they have no strategic interests, P-5 nations could veto interventions, smaller nations feeling powerless against intervention against them, lack of agreement on a "politically acceptable and competent commander", and a Security Council which may become deadlocked to use the force. Godwin, *supra* note XX at 21-22. Professor Kaysen and Rathjens cite the following objections to an all-volunteer UN Army: economic cost, lack of confidence in UN decision-making, and lack of confidence in the UN Secretary-General. Carl Kaysen and George W. Rathjens, "Send in the Troops: A UN Foreign Legion" (1996) 20:5 The Washington Quarterly 207 at 225.

In 1948, Trygve Lie, the UN's first Secretary-General, proposed the creation of a small army to be placed at the disposal of the Security Council and in 1958, the United States proposed the establishment of a stand-by UN Peace Force.[554]

With the end of the Cold War the number of proposals for a similar force has increased with the intent of addressing the short comings of the UN force generation system.

In his 1992 report "An Agenda for Peace", Boutros-Ghali proposed three arrangements by which armed forces would be made available to the Security Council. Although none of the proposals suggested a UN army, they did propose national forces be maintained at a high state of readiness for deployment.[555]

The two rapid reaction forces which have come to fruition and have been deployed include the Danish initiated UN Standby High Readiness Brigade and the European Union's Rapid Reaction Force. Both of these forces will be reviewed for purposes of testing these as solutions to the issue of lack of UN capabilities.[556]

UN Standby High Readiness Brigade (SHIRBRIG)

SHIRBRIG was established 2 September 1997 as a result of the need to "improve the UN's rapid deployment capability within the framework of the United Nations Stand-by Arrangement System [SAS]."[557] On their face, the documents

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[554] Project on Peacekeeping and the United Nations, *Developing a Rapid Deployment Capability: An Old Idea for Troubled Times* online: Council for a Liveable World Education Fund www.clw.org/un/raprec.html at 1 [CLW].

[555] *Ibid.* at 2.

[556] Pursuant to a press release on the Prague Summit Declaration by the Heads of State of 21 November 2002, NATO decided to create their own NATO Response Force (NRF). This is to be fully operational by October 2006. North Atlantic Treaty Organization, Press Release, "Prague Summit Declaration" (21 November 2002) at 2.

[557] SHIRBRIG, *Welcome to SHIRBRIG (Based on the Standard SHIRBRIG briefing)* (2003) [unpublished, archived online: SHIRBRIG www.shirbrig.dk/ at 1 [SHIRBRIG]. The UNSAS was a response to the time delay problem and the ad-hoc nature of the process by which peacekeeping forces

establishing this force, suggest that this is a solution to the problem which has plagued UN missions for many years – rapid reaction or arrival on the scene. Upon closer examination, the conclusion is that this is not the solution to the current situation.

This RRF arose out of a proposal by the Dutch Permanent Representative to the UN in a letter two and one-half years before this forces establishment. The anticipated cost of the proposal was estimated at $250-300 million US per year.[558]

Six nations, including Canada, joined together to establish this RRF. In 2003 there are ten nations which have signed all documents related to this force and thereby confirming their commitment to provide personnel and materiel. An additional eleven nations have either not signed all the necessary documents to become full contributors to the force or are acting as observers.[559]

SHIRBRIG documents indicate that although it is based upon the SAS, the SAS has a number of limitations which include the long established problem that many state military contributions are under equipped and under prepared for deployment and that it takes too much time from the time the Security Council makes a decision to the time of the actual deployment.

The characteristics which this RRF brings to the world stage include:

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were assembled. This system is based upon a database of individual states' agreements to provide the UN with specific resources within a specific timeframe. A detailed review of the UNSAS and its short comings is beyond the scope of this thesis suffice it to say that with an opt out aspect and questions remaining as to the quality of many of the personnel and materiel resources made available (especially from non-Western nations) many of the previous problems remain.

[558] John Norton Moore, "Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance" in John Norton Moore and Alex Morrison, eds., *Strengthening the United Nations and Enhancing War Prevention* (Durham, N.C.: Caroline Academic Press, 2000) Note 64 at 196 [Norton-UN].

[559] SHIRBRIG, *History* (2003) [unpublished. archived online: SHIRBRIG www.shirbrig.dk/ at 2 [SHIRBRIG-History]. Austria, Canada, Denmark, The Netherlands, Norway, Poland, and Sweden were the first nations involved with this RRF.

1. that it will be deployed on a case-by-case basis for more traditional peacekeeping roles of preventive deployment and supervising separation of opposing forces;
2. each deployment will be of six months duration at which time the personnel are returned home or another brigade is deployed;
3. the reaction time target is 15 to 30 days "following the decision of the participating nations to make them available for deployment upon the request by the United Nations";
4. logistically self-sufficient for 60 days;
5. has the capability of "extended self-defence";
6. capacity to deploy in different configurations depending upon what is needed; and
7. capacity to deploy a maximum of 4,000 to 5,000 troops.[560]

A review of the material prior to their first deployment indicates that there were a number of problem areas in how this RRF would be deployed and supported.

Of greatest concern is the limited use which will be made of SHIRBRIG as it is now constituted. As indicated above in characteristic number 1, SHIRBRIG is equipped to be deployed in a situation more akin to traditional or first generation UN peacekeeping missions than in the more robust requirements of missions, characteristic of the 1990s and early 21st century. With an emphasis on self-defence and limited abilities to extricate themselves, it is more likely that the nations agreeing to a deployment of their forces within the SHIRBRIG umbrella will place their soldiers in harms way because they will be under equipped to deal with a more volatile mission environment . What will inevitably happen is the situation which happened to lightly armed Pakistani forces killed in the UNOSOM I mission arriving in Somalia ready for a traditional type of peacekeeping and finding themselves being attacked and killed.

The second concern with the terms of reference of SHIRBRIG is the opting out ability of any SHIRBRIG nation.

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[560] SHIRBRIG, *supra* note 557 at 2-3.

This ability to opt out (thereby maintaining state sovereignty despite an agreement to participate) creates at least two problems. The first is that if a nation should opt out, not only could it place the mission in doubt but, more importantly for the soldiers of the nations which have agreed to provide forces to a particular mission, it could either place those remaining soldiers in greater risk (if no substitute nation could be found) or place the citizens of the nation to which the mission is being deployed at greater risk as the citizenry's expectation of the mission will not be met. This will happen as a result of either SHIRBRIG not being deployed at all or being deployed with limited resources and with a limited ability to deal with situations as they arise (in violation of the early in and in strength principle).

The other element which parallels the concerns raised about the opting out clause is that the SHIRBRIG system does not deal with the delay issue of previous UN missions. A rapid deployment of this force is injuriously affected as it will take some time for each nation to agree to a mission and depending upon the number of nations slated to participate, the seeming 15 to 30 days may grow significantly longer – approximating the standard UN mission delay of three to six months. An element adding to the delay is the need for SHIRBRIG to rely on logistical support and airlift from other nations because the UN and SHIRBRIG nations do not possess this type of support.[561]

By January 2000 SHIRBRIG was declared available to the UN and was deployed the first time in November 2000 into Ethiopia and Eritrea for a six month period. Canada, Denmark and the Netherlands provided units for this six month

[561] Godwin, *supra* note 432 at 23.

deployment. After six months, these nations handed over their peacekeeping responsibilities to soldiers from India and other nations. After a reconstitution period, SHIRBRIG was declared available to the UN for deployment as of 1 January 2002.

To evaluate the SHIRBRIG Horn of Africa deployment, the International Peace Academy (IPA) sponsored a seminar to evaluate this first mission.[562] The participants of this seminar ranged from the commander of the SHIRBRIG deployment into Africa (and other military staff) to ambassadors, politicians and civilian and military members from SHIRBRIG countries.

The IPA report of the seminar confirms "that the period immediately following a ceasefire or peace accord is often critically important in establishing stability and confidence in a post-conflict situation" and that in the past the UN has often lost this opportunity due to delays in the establishment of missions. The participants recognized that SHIRBRIG was meant to provide this support.

A number of shortcomings were raised during this seminar. These were:

1. SHIRBRIG's deployment took some 3 months from the time of the Security Council mandate until the core of the Dutch and Canadian troops were operational;
2. only three nations committed troops which resulted in only 55 of 85 headquarters' staff being deployed;
3. an increased need in closer coordination of national, SHIRBRIG, and UN efforts;
4. despite extensive training by military staff it was still inadequate as not all the headquarters staff were trained to work efficiently together. "Proficiency in the mission language (English), computer literacy, and training for specific posts, were all problematic";
5. the handover to the incoming non-SHIRBRIG UN forces had problems in that there was shortage of start-up kits to replace the SHIRBRIG computers and communications equipment which went home with the

[562] International Peace Academy, "Seminar on First Use of SHIRBRIG Highlights Key Lessons Learned" (A Report of the Seminar on Standby High Readiness Brigade [SHIRBRIG] hosted by the International Peace Academy, 15 March 2002) online: International Peace Academy http://www.ipacademy.org/Events/EventsCalendar16.htm [IPA].

SHIRBRIG organization and there was a lack of training by the incoming forces;

6. a more robust logistics system was required which would provide greater logistical flexibility;
7. the non-western nations which took over from SHIRBRIG did not have the logistical capabilities; and
8. SHIRBRIG needed to work more closely with the UN, various observers and NGO involved in peace building in and development efforts.

Despite the fact that the SHIRBRIG deployment into the Horn of Africa was completed by three western nations (all with extensive traditional and non-traditional peacekeeping training and experience) this attempt at rapid deployment should not be judged the success which the various governments have announced this mission to be.

Despite having trained together for almost three years as part of the SHIRBRIG development process, this mission could not deploy in a timely manner which many if not most of 21st century intra-state conflicts demand if UN-sponsored intervention is to be effective.

Of greater concern is the problem with handovers which continue to plague the UN, especially when the transfer of command responsibility is from the military of a western nation to the military of a developing nation (with the included changes to the command and support elements).

This SHIRBRIG deployment is a failure when evaluated using the MacInnis test because it failed the critical "early in" requirement.

By taking three months to have the core of its soldiers in place this force stumbled in meeting its mission. It is submitted that the reason for this delay is that the opting out provision of the enabling documents allowed only two-thirds of the headquarters to deploy. With such a substantial reduction in planning capabilities, the command structure had to make critical decisions with limited resources and but for the

fact that SHIRBRIG was deploying into a more traditional, first generational type of peacekeeping scenario, lives would have been lost. Although SHIRBRIG passed on the remaining three MacInnis requirements, by leaving the opting out provision in place SHIRBRIG will only be able to respond to a limited range of possible deployment scenarios.

The other areas of concern as to this RRF's abilities to deploy "early in and in strength" are the lack of adequate handover procedures to follow on forces and despite several years of planning and exercising, the continued difficulties with inter-service cooperation in the headquarters which will prove more problematic in a more typical 1990s crisis deployment.

European Union Rapid Reaction Force (EURRF)

On 19 May 2003 the European Union declared that its EURRF was operational.[563] This declaration confirms that the concern, which European nations had expressed about their reluctance to become involved in peace operations without the commitment to the same deployment by the United States, has been cast off.[564]

The objective of this force is to provide the EU the ability to deploy and sustain a military force of up to 60,000 personnel within 60 days for a period of up to one year. The tasks which this military force is to undertake are referred to as the Petersberg Tasks (a hotel near Bonn) and include humanitarian and rescue tasks, peace-keeping, and tasks of combat forces in crisis management, including peacemaking. Although the

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[563] Radio Free Europe. Press Release. "EU: Official Declares Rapid Reaction Force Operational, If Not Rapid" (20 May 2003) at 1.
[564] Goodwin. *supra* note 432 at 14.

various documents refer to international crises, it is clear that the EU will entertain invitations to contribute forces in parts of the world other than in Europe.[565]

The EU may deploy the RRF at the request of the OSCE or the UN and deploy it separately or in conjunction with other international organizations,

The force generation is based upon the Helsinki Force Catalogue – a listing of the EURRF's resources. It lists a pool of more than 100,000 personnel, approximately 400 combat aircraft and 100 vessels required to outfit this RRF.[566] In 2000, initial national commitments were made to supply 67,100 personnel and approximately 305 aircraft and 70 ships.[567]

Article 17 of the Treaty on European Union has incorporated various military tasks and they form an integral part of the European Security and Defence Policy (ESPD).[568]

Critical to the usage of the RRF was that it not duplicate NATO functions and the EU member states have emphasized that this RRF is not the creation of a European army.

The first operation involving the deployment of EURRF troops was "Operation Concordia".[569] This is an ongoing deployment in the Former Yugoslav Republic of Macedonia and began 31 March 2003 following NATO's mission in Macedonia which

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[565] Colonel Stephen R. Norton, "The 'Europeanization' of Balkan Peacekeeping" (Paper presented to the Conference on Stability and Asymmetrical Threats in Southeast Europe, 22-23 May 2002) [unpublished] online: Western Policy Center http://www.westernpolicy.org/Conferences/20020522/NORTONThessalonikiSpeechMay2002.doc at 5 [Norton].

[566] Robert E. Hunter, *The European Security and Defense Policy: NATO's Companion - or Competitor?* (RAND, 2001) online: RAND http://www.rand.org/publications/MR/MR1463/ at 93-94 [Hunter].

[567] *Ibid.* at 95. Germany, France and Great Britain have indicated that greatest amount of contribution to this force.

[568] Online: European Union http://europa.eu.int/scadplus/leg/en/cig/g4000p.htm.

[569] Alexander B. Abele, *The EU Rapid Reaction Force and the Operation "Concordia" in Macedonia* [unpublished, archived online: www.juridicum.at/forschung/abele/macedonia.pdf at 9 [Abele].

was to have ended on 31 March 2002. A total of fourteen EU and 13 non-EU countries have contributed 350 military personnel. This first mission is based upon a UN Security Council welcoming the EU involvement in Macedonia through the provision of observers.[570]

The EURRF's second mission, "Operation Artemis", involves the deployment of EU troops to the Congo in 2003.

On 30 May 2003 the UN Security Council authorized the UN Secretary General to establish an interim emergency multinational force in Bunia.[571] This force is to be in place until 01 September 2003 at which time an expanded UN peacekeeping mission will take over. On 16 June 2003, the EU Council adopted a motion to have the EU RRF, led by the French, deploy into the Congo. By the time this motion passed, the French had already deployed to the Congo for at least one week and had engaged in a firefight with one of the elements which they had come to disarm. By 7 July 2003, the full EU complement of 1,100 troops was on the ground in Bunia, Congo.[572] Six hundred EU mission members were stationed in a supporting role in Uganda with a further 160 in Chad.

Issues with the EURRF

To sustain a force of 60,000 troops "it is necessary to have a total force of 150,000 to 180,000 soldiers to cover normal rotations, training, leaves, and

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[570] SC Res 1371(2001), UN SCOR, 4381st meeting, UN Doc S/Res/1371(2001) online: UN http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/552 01/PDF/N0155201.pdf?OpenElement at 1-2.
[571] SC Res 1484(2003), UN SCOR, 4764th meeting, UN Doc S/Res/1484(2003) online: UN http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/377 68/PDF/N0337768.pdf?OpenElement.
[572] MONUC, Press Release, "EU peacekeeping force in DR Congo town of Bunia reaches full strength" (7 July 2003) online: MONUC http://www.monuc.org/news.asp?table=news&language=0&id=764 [MONUC].

contingencies."[573] To date, the 100,000 troops which have been committed are insufficient to sustain this RRF. The peace dividend (of fewer troops and reduced military expenditures) will continue to play a role in deployments as those countries with EURRF responsibilities will look to reduce their commitments for NATO deployments. This aspect has implications not only for NATO but the countries which are NATO countries, i.e. Canada and the United States, as these nations will then be called upon to increase their commitment to NATO at the same time as they themselves face reduced military expenditures and reduced troop size.

Colonel Norton also notes two additional concerns about the EURRF – its need to improve certain military capabilities and increased politico-military coordination.[574]

The national armed forces of the various EU contributors lack military capabilities in many areas including combat search and rescue, nuclear, biological and chemical protection, and air and sea movement of their soldiers. These problems may be fixed with increased military expenditures (a series of project groups have been established by the EU to deal with these issues) however, the greater difficulty is ensuring that comments made by EU politicians will be matched by military capabilities on the ground.

Chris Lindborg notes similar concerns in a paper prepared for the British American Security Information Council (BASIC).[575] She notes concern about potential bickering between NATO and the EU (competing for missions or on sharing of resources) leading to delays in deployment, the opting out ability of countries which do

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[573] Norton, *supra* note 565 at 5.
[574] *Ibid.* at 6-7.
[575] Chris Linborg, "The EU Rapid Reaction Force: Europe Takes on a New Security Challenge" (August 2001) [unpublished, archived at British American Security Information Council online: BASIC www.basicint.org/pubs/Papers/BP37.htm at 5-6 [Linborg].

not wish to send their soldiers on any particular mission limiting EU RRF options, UN Security Council-like paralysis as EU nations may refrain from supporting a RRF mission "if a situation is similar to their own political exigency" (i.e. China's veto on matters crossing the line of state sovereignty), the development of a tendency to deploy what you have available as opposed to deploying what is needed in a given situation, and taking too long to fully deploy while the crisis they are being sent to escalates from a crisis into a full-scale war or disaster.[576]

Disputes between EU members and between its members and other regional organization members have already arisen and will undoubtedly arise in the future.

A dispute between Greece (a EU and NATO member) and Turkey (a NATO member only), arose over this RRF's proposed use of NATO assets for Operation Concordia.[577] This dispute arose as a result of Turkey's threat to block the EU from using NATO assets over fears about any possible future deployment in the Aegean region or in Cyprus. In turn, the Greek government objected to the "Ankara Text" (an agreement amongst the United States, Great Britain and Turkey giving Turkey a say in the EU force's operations in the Aegean and in Cyprus in exchange for allowing the EU RRF to use NATO assets) because it violates Greek interests in that region.[578]

Another example of the politicians' statements not being able to be met by military capabilities is the UN Security Council initiated and allocated mission in the Congo.

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[576] *Ibid.*
[577] "EU force under threat" online: European Defence www.european-defence.co.uk/article17.html.
[578] "Hope for Euroforce" *Kathimerini* (1 June 2002) online: Kathimerini http://www.ekathimerini.com/4dcgi/_w_articles_politics_2875842_01/06/2002_17104.

Operation Artemis was not even launched when Africa Confidential noted in an article titled "Un-rapid reaction", that as the fighting in the targeted province continues, plans for the force "are embroiled in United Nations and European Union bureaucracy."[579] The report further noted that Rwanda objected to the French leading the force noting that it was inappropriate for them to have this leading role. By the second week of June 2003, elements of French troops (the lead country) were already in the Congo but it was not until 7 July 2003 that all 1,100 troops were reported to be in Bunia, Congo the centre of the stabilization efforts.[580]

In applying the MacInnis test to this force and its two deployments we note that this RRF has mixed results. Although the EURRF was able to forward its troops within a few weeks of the UN invitation for its deployment into Africa, the EURRF's deployment into its own backyard took almost three years to begin as a result of political issues. The EURRF does have the ability to quickly mount a deployment, however, it is submitted that the African deployment was successfully mounted as a result of the French wishing to protect and enhance its interests in the region.

The Macedonian operation does appear to meet all the other MacInnis requirements (coercive force, IHL operations and intervention beyond essentials) but for EURRF deployments to be honestly evaluated the EURRF will need to deploy, in strength, to an area where they are not simply taking over NATO assets, command relations and equipment and calling them their own.

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[579] Africa Confidential, News Flash (30 May 2003) online: Africa Confidential www.africa-confidential.com/.
[580] MONUC, *supra* note 572.

The African deployment, centred upon France's primary contribution, will be evaluated in the months to come, however, Africa Confidential's calling it an Un-rapid reaction may also prove foreboding. This mission's evaluation will also be centred upon the sufficiency of the 1,100 soldiers located in the one town of the Congo and whether this effort will address the greater needs or is simply an opportunity for the EU to experiment on the backs of the Congolese.

A Future Solution

It is clear from this brief review of regional and rapid reaction forces that basing peacekeeping or peacemaking on national militaries which would serve as part of a multilateral force is not a solution. Despite various configurations, these forces take too long to deploy, they take too long to train, they are too expensive to train and operate and despite world condemnation of genocide and other situations which have led to past humanitarian intervention, nations still want to be able to opt out of any deployment.

There is no potential for a UN standing army.

Questions relating to a UN army's size, training, its home station, recruiting and funding have dogged the UN for too long without effective response to make any concrete strides in this direction. As noted by Prof. Tad Daley, the larger political questions also emerge in this debate, specifically those surrounding the P-5 veto power.[581] Criteria for intervention would need to be established and Daley also suggests that a strategy would need to be developed should this UN force start to lose a

[581] Tad Daley, "When speed matters" May/June 2003 *Bulletin of the Atomic Scientists* 22 at 24-25.

battle with belligerents. Will other militaries come to its rescue or reinforcement is a question which requires further development.[582]

[582] From a deterrent point of view this is a critical consideration. In a conversation which this author has had with a senior member of the Canadian military who served in Croatia with UNPROFOR in the early 1990s it was emphasized that the US Naval presence off the coast of the FRY and the occasional fly by of US air power provided pause to the belligerents and assurance to the Canadian peacekeepers on the ground that if the fighting developed beyond the available Canadian capabilities, US air power was there to back the peace process.

PART 4 – WHY USE PMCs?

This Part is divided into three sections. The first section examines the arguments used against the employment of mercenaries, the second section critically analyses the use of non-western national militaries and the third, considers several positive aspects in the placement and use of PMCs for peacekeeping operations.

4.1 – Examining the Arguments Against the Employment of Mercenaries

The unfortunate and reflex reaction by those opposed to the use of PMCs in current and future UN peacekeeping and peacemaking missions can summarized in an incident from 2000. Towards the end of a discussion with an unnamed senior UN official about initiatives in partnering with other international institutions, he was asked his thoughts about privatized peacekeeping. "He reacted with dismay, recounting horror stories of mercenaries run amok in Africa. 'The United Nations is a public institution [.] … Giving its functions over to private companies would be irresponsible and dangerous."[583]

At least three specific points are made by opponents of the use of mercenaries to suggest that there is a "moral inferiority" in the use of mercenaries.[584] These points, centred upon the comparison between mercenaries and nation-state soldiers, are: "(i) remunerative motives, (ii) right intention, and (iii) reluctance to go to war."[585]

When these positions are considered in detail these arguments fail.

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[583] Allan Gerson and Nat J. Colletta, *Privatizing Peace: From Conflict to Security* (Ardsley, N.Y.: Transnational Publishers, Inc., 2002) at 83 [Gerson].
[584] Tony Lynch and A.J. Walsh, "The Good Mercenary?" (2000) 8:2 *The Journal of Political Philosophy* 133 at 142 [Lynch].
[585] *Ibid.*

Remunerative Motive

The arguments under this rubric are centred upon the idea that "the mercenary's killing motives are morally inappropriate because they are in a determining sense financial."[586] That mercenaries are whores of war and paid with blood money.

As Lynch and Walsh argue, this line of argument fails in that "it is empty to base hostility to mercenarism *simply* (sic) on the basis that work for remuneration is immoral in itself or destroys character."[587] They suggest that this same logic could be used against many different targets in society that perform services or provide goods in exchange for money.

This motive is further refined by suggestions that financial considerations are determinant of the subsequent action, even if they are not the sole motive. Those whose actions are dominated by financial motives are referred to lucrepaths.[588] This would then seem to be sufficient to distinguish soldiers in national armies from those who are mercenaries. However, Lynch and Walsh suggest that this point does not end the debate as there "is nothing about the nature or structure of national armies which prevents soldiers from having such motives."[589] Lynch and Walsh also note that there is nothing to confirm that mercenaries are solely motivated by financial considerations as there are historical examples showing otherwise.[590]

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[586] *Ibid.* at 125.
[587] *Ibid.*
[588] Lynch, *supra* note 584 at 136.
[589] *Ibid.*
[590] *Ibid.* at 137. The example offered by Lynch and Walsh is that of John Hawkwood (of Siena fame in Part I) who maintained throughout his activities loyalty to his British heritage and that he insisted on a contractual clause excusing him from participation in a war against England. *Ibid.*

A review of many of today's military web-sites or recruiting offices indicates that they promote themselves as career options with competitive salaries and increased levels of education.

Canada's military has gone one step further by developing a detailed Engineering Officer Recruitment Allowance – a $40,000 signing bonus for applicants who possess specific engineering and science degrees and are selected into one of six different engineering occupations.[591]

Professors Lynch and Walsh then compare the mercenary to a volunteer to consider whether someone who does something without financial motive is "of better moral character than an employee."[592]

They also find this position incomplete because while "purity of motive may well be morally desirable in many cases" where would this purity enter the picture in cases where killing other people is involved. "When terrible things are in question, the licence of the righteous to such performances may well magnify their number and severity."[593]

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[591] Department of National Defence, News Release/Backgrounder, "Engineering Officer Recruitment Allowance" (24 January 2003), online: dnd http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=344. This release goes on to estimate that this program will cost $30.56 million over the next three years (until 31 March 2006). The program requires that the applicants make a four year commitment to stay in the Regular Force. This is similar to another recruiting bonus payable to non-commissioned members of the forces when they have already completed studies in a number of medical and communications/computer areas prior to their enrolment in the Regular Forces. This program pays $10,000 and $20,000 bonuses and grants the incoming person increased rank and pay (corporal instead of private, $42,000 instead of $25,000) to assist in filling a shortfall in trades such as military police and mechanics. Department of National Defence, News Release/Backgrounder, "Attention Community College Graduates, Tradesmen and women, and Former Military Members" (30 March 2001), online: dnd http://www.recruiting.forces.gc.ca/html/news_events/news_room/atte_comm.html.

[592] *Ibid.*

[593] *Ibid.* at 137-138.

Right Intention

This argument is used by those who oppose the use of mercenaries based upon the Augustine-Aquinas *jus ad bellum* or just cause notion of going to war. Those who advocate this principle follow the Aquinas tradition that "the agent be motivated by a just cause and possess the right intention" and that this is the only justification for killing.[594]

Lynch and Walsh again compare national armies with mercenaries and suggest that the regular soldier is often not motivated by the expressed or just causes for the war. They then suggest that perhaps mercenaries are never motivated by the justice of the cause. Although there is some debate as to whom just war theory applies, Lynch and Walsh suggest that if this theory is not binding upon individual soldiers but only upon their sovereign then as stated by Suarez, "mercenaries can be classed with all common soldiers who need not consider the justice of war."[595]

Despite this conclusion, they re-examine the right intention argument, attempting to determine what would be needed for an ordinary soldier to have the right motivation to kill. Two points are suggested – group identification and patriotic feelings.

They argue that the group identification suggestion no more legitimizes group violence than any other reason. They scorn the suggestion that being identified with a nation-state makes any difference in this debate. That nations make armed violence any more legitimate raises for Lynch and Walsh serious questions as to the basis of this legitimacy. That except for the situation when the survival of the nation is at stake as a

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[594] *Ibid.* at 138.
[595] *Ibid.* at 139.

result of an attack by an external hostile force, many state citizens oppose violent state action. At this juncture, Lynch and Walsh suggest that there are 'good mercenaries' who only participate in just wars when "legitimate nation-states are under threat of invasion"[596] and submit that that any arguments that this is the exception (with the obverse being that national soldiers tend to have this motivation) lack evidence of either of these conclusions.

Reluctance to go to war

This third anti-mercenarist argument is based on the supposition that a righteous warrior hates war and is not eager to engage in mortal combat and many suggest that mercenaries have no reluctance to go to war.

Lynch and Walsh find little evidence to support this suggestion. Although they acknowledge that although mercenaries desire money to live (as do national soldiers) and that this may prompt one to become a mercenary, this is also often the motivation for soldiers who join a national military. They also suggest that there are many examples throughout history where mercenaries have been decried for not engaging in combat. As noted in Part 1 of this thesis, the motivation for many cities in fourteenth century Italy to hire mercenaries was to prevent their neighbours from hiring them and using the *condottieri* against them.

Professors Lynch and Walsh conclude that although there are examples of some mercenaries arriving at the scene of conflict with objectionable motives, this cannot be generalised to condemn all mercenaries or the institution of mercenarism.

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[596] *Ibid* at 141.

Lynch and Walsh review a number of additional arguments against the use of mercenaries and conclude that although mercenaries may be an "unpleasant group of people when compared to the Statist martial institutions currently in place, the system of mercenarism may well be preferable."[597]

In addition to these moral arguments, those stepping out against the use of mercenaries suggest other reasons based upon legal or policy foundations.

Coercive stability versus lasting stability

Professor Francis suggests that it was only through the "coercive stability provided by EO" that democratic elections could be held in Sierra Leone in February/March 1996.[598] He argues that the stability disappeared shortly after EO disappeared from Sierra Leone. (The Sierra Leonean government expected the deployment of UN peacekeepers as a neutral monitoring force and as a result agreed to EO departure as a term of the Abidjan Peace Accord in November 1996.)[599] The irony in this is that this is one of the requirements of an effective force as noted by MacInnis.

Professor Taulbee's response to this comment is to take the position that PMCs provide the range of services contracted for by employing governments and that the "extent of the order established can be little better than that desired" by the government. These companies are not agents of social change.[600] Although Taulbee agrees that outside assistance can bring temporary stability (the point of the thesis), it is this writer's submission that this temporary stability will afford the UN time to decide upon

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[597] *Ibid.* at 153.
[598] Francis, *supra* note 507 at 327.
[599] *Ibid.*
[600] Taulbee-Mercenaries, *supra* note 148 at 447. This debate is somewhat applicable to the Canadian Forces in overseas deployments as there continues to be debate as to the proper role of Canada's military, which some have argued, includes being the world's social workers. See note 470.

a course of action suitable to the situation. The reduced cost of the use of PMCs vis-à-vis the cost of another UN peacekeeping/peacemaking mission would allow international monies to flow into conflict resolution and conflict prevention rather than into the pockets of elites of developing countries (as will be discussed in section 4.2).

Economic exploitation

Professor Francis describes the hiring and paying of PMC by state governments as "exploitative colonialism".[601] He suggests that the cash and resource basis of recompense has a debilitating effect upon state systems and those PMCs "reflect the pervasive influence of economic liberalism in the late twentieth century.[602]

In response to this position, Professor Taulbee suggests that a number of factors have lead to many developing countries having little cash flow but, by using their natural resources "even weak governments have leverage."[603] These assets give them increased "flexibility and choice"[604] as to how to defend themselves against external interests (Taylor's sponsorship of RUF in Sierra Leone) or internal criminal elements. Taulbee adds that blaming these companies misplaces the responsibility of the current state of affairs in the countries and governments which hire PMCs to defend themselves.

Advocates of this argument also ignore the role which various ruling elites serve in the exploitation of natural resources for their personal benefits. When one reviews the extent and nature of the commercialisation of African militaries (later in this

[601] Francis, *supra* note 507 at 331.
[602] *Ibid.*
[603] Taulbee – Mercenaries, *supra* note 148 at 446.
[604] *Ibid.*

section) and the commentary and specific examples of internal exploitation in the works of Wiwa and Okonta, this argument rings hollow.

Erosion of political sovereignty

Professor Francis advances the claim that by hiring PMCs to secure its borders, a government gives up some of its sovereignty.[605]

He suggests that by its seemingly indispensable role as the state security provider, EO was given a "stranglehold on the NPRC government" holding the entire politico-military and economic system for ransom.[606] Francis adds that EO used the threat to withdraw (because of delays in the payment of monthly contracted amount) as a ploy "to wrest further concessions from the government."[607] No evidence is provided of these additional concessions.

Francis adds to his position by quoting Nana Busia when Busia states that "[t]he war against mercenarism, is therefore a war to preserve sovereignty, against lawlessness." The evidence shows exactly the reverse in Sierra Leone where EO brought stability to the country and when they were forced out, the instability and death returned.

A number of responses are available to meet this position. The first is that the signing of a contract with a PMC is an exercise of a state's sovereignty, much as the signing and ratification of an international treaty is the exercise of a state's sovereignty.

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[605] Francis, *supra* note 507 332.
[606] *Ibid.*
[607] *Ibid.*

The matter of the legal status of both parties has been recently reviewed in a 1998 arbitration case. The government of Papua New Guinea owed money to a PMC – Sandline International.[608]

This dispute and arbitration arose as a result of Sandline International Inc. (Sandline) claiming payment of the second instalment of $18 million from the government of Papua New Guinea (PNG) pursuant to a contract.

On 31 January 1997 PNG's Deputy Prime Minister signed a contract with this PMC for it to provide training, intelligence, conduct offensive operations to "repossess the Panguna mine" and provide additional support as agreed to between the parties.[609] The agreed to fees totalled $36 million. Sandline provided a range of services and personnel to assist the government to retake the mine which provided the government with 17% of its revenue. As a result of a mutiny of members of the state's military, conditions changed and prevented Sandline from completing its contract as Sandline personnel were flown out of the country on 21 March 1997. Until that time both parties worked towards the completion of the contract.

The government amended their Statement of Defence and argued that the contract was unlawful and the PNG signatories lacked capacity to sign on behalf of PNG.

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[608] *In the Matter of an International Arbitration under the UNCITRAL Rules between Sandline International Inc. and the Independent State of Papua New Guinea* (1998), 117 I.L.R. 552 (Arbitration Tribunal), (Arbitrators: The Rt. Hon. Sir Edward Somers, the Rt. Hon. Sir Michael Kerr, and Hon. Sir Daryl Dawson) [Arbitration] appealed by Papua New Guinea and dismissed by Supreme Court of Queensland at *In the Matter of the Commercial Arbitration Act 1990 and In the Matter of an Application Pursuant to Section 38 thereof by the Independent State of Papua New Guinea Against Sandline International Inc.* (1999) , [1999] 117 I.L.R. 565 (S.C.) [Appeal].

[609] *Ibid.* Arbitration at 555.

The Arbitration Tribunal rejected the defence of illegality or unlawfulness of the contract, "notwithstanding any failure to observe the constitutional and other statutory provisions upon which PNG relies to establish the illegality or unlawfulness … or lack of capacity to enter into it."[610] They then ordered payment of the full amount plus interest plus costs.

PNG appealed the decision to the Supreme Court of Queensland, Australia and Ambrose, J. of that court dismissed the appeal as the "Court has no jurisdiction under s 38 [of the Commercial Arbitration Act, 1990] to entertain an appeal upon questions of law arising out of an award where such questions relate only to foreign law."[611]

PNG had launched their appeal based on a number of questions of law, primarily focussing their argument on their view that the Arbitration Tribunal had made an error of law in how it interpreted the interplay between international law and English law (the proper law of the contract). The Court made no comment with respect to the issue of illegality.

Implicit in Francis's position is the military threat to state sovereignty.

Prof. Taulbee submits that the capabilities of PMCs are limited and "pale beside those of states"[612] and as a result, are not a threat to sovereignty. As evidence, Taulbee notes that although Executive Outcomes fielded 600 personnel in Sierra Leone and 300 in Angola, they "were always important adjuncts to, *not* (sic) total substitutes for, other military capability."[613] He then looks to two of the major American PMCs and indicates that to verify Serb withdrawal (in accordance with a contract), DynCorp

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[610] *Ibid.* at 562-563.
[611] *Ibid.* Supreme Court at 593.
[612] Taulbee–Mercenaries, *supra* note 148 at 447.
[613] *Ibid.*

provided 150 personnel while Vinnell's contract in Saudi Arabia employs approximately 1,000.

From the earlier PNG situation, it was also clear that the lack of support from the local military lead to Sandline's departure from PNG.

Dr. Adams also suggests that there are four reasons why PMCs could not become stronger than the states which hire them.

His first point supports Taulbee's conclusion that the military power of these companies "is miniscule in comparison to even third-rate national armed forces" and adds that their military successes were as a result of fighting unorganized or feeble opposition forces.[614]

The second reason is that "nation-states remain the locus of legal authority" and that there has been "no clear instance of a PSC [private security company] accepting a contract without the consent of the state in which the contract was executed."[615]

Globalization and the effect of corporations wielding enormous power and influence without the use of military force is the third reason, because if states have allowed corporations to wield influence and power almost without limit why "seek it through the wasteful and inefficient methods of military force."[616]

The final response to this suggestion is that should PMCs attain the level of influence suggested by other writers, "the great powers would certainly make it their business to implement legal constraints."[617]

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[614] Thomas K. Adams, "Private Military Companies: Mercenaries for the 21st Century" (2002) 13:2 Small Wars and Insurgencies" 54 at 64 [Adams].
[615] *Ibid.*
[616] *Ibid.* at 65.
[617] *Ibid.*

Poor human rights record

Prof. Francis also objects to the use of mercenaries as a result of their poor human rights record. As an example, he cites a situation in Sierra Leone during an EO rescue of three Lifeguard Security personnel who had been kidnapped by the RUF while guarding the Rutile mines in Mobimbi and whose rescue apparently resulted in "very high civilian casualties."[618] Another example used by Francis is the military action taken by a Gurhka unit in Sierra Leone to recover its commander's body. He characterizes the recovery attempt "remarkable for its brutality and indiscriminate killings."

A more specific example of violations of human rights is again offered from EO's contract in Sierra Leone. Two former South African pilots were in Sierra Leone as part of the contracted services and while they were providing support to the Sierra Leonean military they "were having difficulty distinguishing between the rebels and the civilians" who were under and amongst the trees during the assaults. The Sierra Leonean military commander replied to this that they should "[k]ill everybody", which they did.[619]

Contrast these episodes with a decade of human rights violations by Nigerian troops in Liberia and Sierra Leone (a number of examples cited elsewhere in the thesis). On 23 July 2003, in his testimony before the Sierra Leone Truth and Reconciliation Commission, Dr. Julius Spencer and others discussed the role of a Nigerian officer

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[618] Francis, *supra* note 507 at 332.
[619] Elizabeth Rubin, "An Army of One's Own" (1997) 294:1761 Harper's Magazine 44 at 48 [Rubin].

nicknamed Captain Evil Spirit who summarily killed civilians identified by other civilians as rebels with no time for justice between the identification and the killing.[620]

As a further contrast to the pilots shooting episode noted above, thousands of civilians returned to Kono from hiding in villages to the north and from refugee camps in Guinea after they had heard EO had freed Kono of the RUF.[621] Rubin noted that during her visit the educated elite said that there was no alternative to the cost of hiring EO and quoted Sam Norma, the newly appointed deputy defense minister as saying that "[o]ur people have died, lost their limbs, lost their eyes and their properties for these elections. If we employ a service to protect our hard-won democracy, why should it be viewed negatively?"[622]

As Rubin traveled around Sierra Leone she mentions that Sierra Leonians talked to her about security, not national defence, "because in the end what had plagued the country was not war but organized banditry."[623]

Executive Outcomes (EO), a South African-based PMCs disbanded in 1998, has often served as the lightning rod for criticism directed at PMCs.[624]

EO's most public contracts for services were with the MPLA (Movimento Popular de Libertação de Angola – Popular Movement for the Liberation of Angola)

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[620] Mahamed Issa "Dr. Spencer Speaks On ECOMOG Atrocity" *Standard Times (Freetown)* (23 July 2003) online: allAfrica.com http://allafrica.com/stories/200307230950.html.
[621] Rubin, *supra* note 619 at 48.
[622] *Ibid.* at 49.
[623] *Ibid.*
[624] For a detailed account of EO see Arnold at 113-122, Jeremy Harding, "The Mercenary Business: 'Executive Outcomes' (1997) 71 Review of African Political Economy 87, Jesse Selber, MPH and Kebba Jobarteh, MPH, "From Enemy to Peacemaker: The Role of Private Military Companies in Sub-Saharan Africa" (2002) 7:2 Medicine and Global Survival 90, and Lee Seymour, "Private Military Intervention and Human Security in Sierra Leone: Moralising, Naïve and Pragmatic Approaches to the New Mercenarism" (2000) 15:2 International Insights 7 [Seymour].

government from 1994 to 1996 and with the Sierra Leonean government in 1996.[625] Both contracts were to assist and help end the governments' wars with rebel bands.[626]

David Shearer identified three characteristics which seemed to set EO apart from other PMCs and as a result seemed to contribute to its notoriety.[627] These characteristics were: firstly, its apartheid-era South African Defence Force (SADF) origins; secondly, that it provides combat support; and finally, the appearance of corporate links with mining and oil-exploration companies.[628]

The available evidence clearly points to the fact that the founders and many employees of EO were veterans of SADF special forces and operation units.[629]

EO personnel have engaged in combat, although many have admitted to only the occasional use of weapons in self-defence. The fact that eleven EO personnel died in Angola (seven missing) and four died in Sierra Leone and neither of these statistics led to the withdrawal of services as compared to the military and political implications of the loss of American personnel in Somalia in 1993[630] is good evidence to refute charges that a PMC will abandon a contract after losses of personnel.

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[625] IA-PMCs, *supra* note 73 at 16.
[626] There is evidence that EO cooperated with a number of relief NGO "primarily through helicopter transport and regional stabilization." Seymour, *supra* note 624 at 35. A Save the Children relief worker "is quoted as saying 'mercenaries bang heads very effectively and that's when babies get fed.'" *Ibid.*
[627] David Shearer, *Private Armies and Military Intervention* (Oxford: Oxford University Press, 1998) at 40 [Shearer]. He compared EO to the American-based Military Professional Resources Incorporated (MPRI), a company with significantly higher earnings and providing a range of services, primarily to the U.S. government. MPRI has also provided services to other countries including an involvement in Angola (1997) and Bosnia (1995). For more detailed review of this corporation's activity see *Ibid.* 56-64.
[628] These links with corporations is not restricted to resource industries. Levdan, an Israeli-based PMC, had a contract with a former president of Congo (Lissouba) was instrumental in the Congolese government purchasing US$10 million worth of Israeli weapons and military equipment. Guy Arnold, *Mercenaries: The Scourge of the Third World* (London: MacMillan Press Ltd., 1999) at 128.
[629] Shearer, *supra* note 627 at 41.
[630] *Ibid.* 42-43.

There is evidence of EO's links with two corporations – Strategic Resources Corporation (under whose umbrella EO functions along with some 19 other companies) and Branch-Heritage Group (mining and exploration) which includes Diamond Works a Vancouver-based company and Sandline International (a PMC which some claim as a successor company to EO and who advocates on behalf of PMCs through its webpage and through presentations to governments and the press).[631]

In response to this evidence, Shearer adds two factors which will continue to provide an environment which lend themselves to the continued use of PMCs and assesses PMCs abilities and shortcomings. These two factors are the "persistence of internal conflict and Western reluctance to intervene" and concludes that PMCs are not a "passing phenomenon", but that they do have their limitations and agrees that "these companies rely on outside parties to broker agreements and set the parameters for post-conflict reconstruction."[632]He also adds the conclusion that although EO has not been involved in a sufficient number of situations from which to draw a comprehensive conclusion as to its effectiveness what is clear is that in the two situations in Angola and Sierra Leone it "created the conditions conducive to settlement, achieved a degree of stability and reinstated government access to key resources."[633] In a word – effective.

Although these issues are of concern, of greater concern is the question of accountability of PMCs which has wider implications.

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[631] *Ibid.* 43.
[632] *Ibid.* 65.
[633] *Ibid.* 66.

With respect to the accountability of PMCs, Shearer equates the use of PMCs by governments in the same way as governments purchase weapons from private sources.[634]

The critical aspect of weapon purchasing is the end-user certificate confirming that arms purchases reach their intended destinations. The Fowler Report, established in 1999 to investigate violations of Security Council sanctions against UNITA (Uniao Nacional Para a Independencia Total de Angola), pointed out clear evidence that there are significant problems at the nation-state level with this process of accountability.[635] This comparison does not bode well for considering the accountability of PMCs.

Shearer also notes that there are those which are critical of suggestions that a binding contract between a government and a PMC "ensures *de facto* accountability."[636] Although he agrees that there would be little incentive for a PMC to remain in a country if it fails to pay, he responds that there are recent examples of countries withdrawing their soldiers after taking casualties with serious consequences for the stability of the country which had been the subject of the initial intervention.

Another accountability argument lies in suggestions that PMCs are not subject to humanitarian and human-rights laws.

Shearer and Seymour note that all parties to a conflict are bound by Common Article 3 of the Geneva Conventions. The question of the impact of the International

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[634] *Ibid.* 69.
[635] *Final Report of the UN Panel of Experts on Violations of Security Council Sanctions Against UNITA*, UN SCOR, Annex I, Enclosure, UN Doc. S/2000/203 (2000) online: Global Policy www.globalpolicy.org/security/sanction/angola/report.htm at para 51 where the report states that it found a "willingness of certain countries in Africa to provide their end-use certificates to UNITA and to facilitate the passage of arms and military equipment through their territory to UNITA".
[636] Shearer, *supra* note 627 at 69.

Criminal Court is another potential forum for accountability, but this consideration is beyond the scope of this thesis.

What should be of greater concern to those who employee this as an argument against the use of PMCs, should be consideration of the lack of compliance and even understanding of humanitarian and human rights laws of nations currently providing armed forces to both UN and non-UN intervention missions. Most recently, the West welcomed news that the Nigerian military will provide the stabilizing military force in Liberia. Sufficient general and specific examples of the understanding and compliance of personnel from this nation with respect to human rights and humanitarian laws has been provided elsewhere in this thesis to show that a force composed of this nations military will undoubtedly compound the problems in Liberia. Seymour, notes that "against the background of abuses committed by UN peacekeepers in Somalia and Bosnia, to say nothing of ECOMOG's conduct in West Africa, corporate mercenaries do not appear especially ignorant of their obligations under international humanitarian law."[637]

The U.K. PMC Green Paper notes that "a key issue for accountability is transparency" and notes Sandline International's suggesting that PMC involvement in a conflict could be monitored by international sponsored and paid observers[638] although there is also recognition that there are practical difficulties of being able to put this suggestion into effect.

Lee Seymour also responds to two other elements of arguments used against the employment of PMCs.

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[637] Seymour, *supra* note 624 at 39.
[638] Green Paper, *supra* note 72 at para 36.

In commenting on the moralizing statements often made by opponents of PMCs (including the fall 2000 comment of an unidentified senior UN official who reacted with dismay at the suggestion of privatizing peacekeeping and "recounted horror stories of mercenaries running amok in Africa"[639]) Seymour notes that some critics, such as Enrique Ballesteros, UN Special Rapporteur on mercenaries, have recently backtracked on their conclusions, instead suggesting "regulations clearly establishing the areas in which private companies may legally operate"[640] are required (as compared to previous outright bans). She also shows contempt for the moralizing statements which draw "distinctions between public and private violence" concluding that state forces often represent private interests as much if not more so than PMCs (as explored in Part 4 of this thesis on the subject of the commercialization of militaries).

Lee Seymour also deals with the issue of proto-colonialist arguments especially as they relate to some of the PMCs' alliance with resource companies. She responds to this criticism by noting that these new alliances of resource firms/PMCs with governments "are based on mutualities of interest" in that unless the mineral rich areas are secure from rebel or brigand forces the governments and the citizens they represent derive no benefit from those resources.[641]

As noted elsewhere in this thesis, Professor Taulbee adds that by using its resources a state may level the odds of its survival.

The British government is currently wrestling with the issue of accountability of PMCs through the use of regulation after it was implicated in the so-called Sandline

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[639] Gerson, *supra* note 583 at 83.
[640] Seymour, *supra* note 624 at 27.
[641] *Ibid.* at 29.

Affair from the spring of 1998.[642] Reaction to these allegations led to a government Green Paper, finally presented on 12 February 2002.[643]

The paper reviews definitions and the history of mercenary and PMC use and concludes that there are six regulatory options which should be considered. These are:

1. these activities should be banned by amending current legislation or drafting new laws;
2. a ban on recruitment for military activity abroad;
3. licensing for contracts abroad;
4. registration and notification to the U.K. government;
5. a general license for PMCs and PSCs; and
6. self-regulation through a voluntary Code of Conduct.[644]

Consultations on this Green Paper continue through the submission of responding papers and conferences.

South Africa has also wrestled with the issue of accountability and drafted a law[645] which has shown that there can be a certain amount of accountability in the actions of its citizens. This accountability is best confirmed in the recent sentencing of a French-born South African, Richard Rouget.[646] After pleading guilty to conducting mercenary activities in Ivory Coast (recruiting twelve pilots and ground troops to participate in mercenary activities in Ivory Coast), Rouget was fined R 100,000 (US$14,000) and sentenced to jail for five years, suspended, on the "condition that he was not found guilty of a similar offence" for a period of five years.

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[642] Allegations of the U.K.'s cooperation with Sandline International (a successor company to EO) "to arrange the counter-coup that returned Kabbah to power" were substantiated by later emerging evidence. *Ibid.* at 27.

[643] See note 72.

[644] Green Paper, *supra* note 72 at paras 71-76.

[645] *Regulation of Foreign Military Assistance Act, 1998*, No. 15 of 1998. This legislation has been criticized in that its definition of mercenary is so broad as to potentially include aid workers within its terms. For a critic of this legislation see Mark Malan and Jakkie Cilliers, "Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill" Occasional Paper No. 25, Institute for Security Studies (September, 1997). No changes were made to the Bill as a result of this critique.

[646] "'Mercenary man' fined" *South Africa News* (01 August 2003), online: News24.com http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1396192,00.html .

4.2 – Examining the Current Peacekeeping/Peacemaking Record

To consider the UN's record to date, we will examine a number of problems in how it conducts peacekeeping operations. These subjects will include: the development of the peacekeeping industry (as a result of the UN reimbursement plan), loss of equipment, raising of funds to pay for peacekeeping, cost effectiveness of UN missions, questionable motives of participants, the commercialization of developing nations' militaries and an example of a developing nation UN mission failure.

Reimbursement of National expenses

In any given UN peacekeeping mission dozens of countries may contribute personnel and materiel. During the United Nations Transitional Authority in Cambodia (UNTAC) eighteen countries provided personnel.[647] In November, 1993 in Somalia, 28 nations contributed their soldiers to UNOSOM II (United Nations Operation in Somalia).[648]

One of the major reasons which non-interventionist scholars cite as an important factor against any intervention in affairs of other states is that intervening nations have ulterior motives.

In addition to the political or military motives often assigned to countries which have been involved in humanitarian interventions, I would like to add another motive – the financial reward available to those nations participating in a UN mission.

There has developed a UN peacekeeping industry among developing nations.

All nations receive funding to defray the cost of their peacekeeping contributions of personnel and materiel,

[647] Rikhye, *supra* note 466 at 175.
[648] *Ibid.* at 177.

For developing nations the funds received from the UN not only defray the cost of the military personnel serving under the UN flag but these nations use substantial portions of the UN monies to cover the remaining costs of their nation's military.

This assistance to developing nations' militaries operates in the following manner.

Each member country contributes to both the general expenses of the United Nations and to the expenses incurred for special activities such as the maintenance of peacekeeping forces.

Each country's dues are set according to that country's economic power. As a result, the United States has paid 31.7 per cent of peacekeeping expenses, Canada has paid 3.1 per cent while countries such as Fiji and Ghana each contribute 0.002 per cent of the cost of peacekeeping missions.[649] In 1993 this translated to an American contribution of $800 million, a Canadian contribution of $75 million, and a Fijian and Ghanaian contribution of $45,000 each.[650]

The UN reimburses nations providing peacekeeping forces with a set amount payable to all nations. As a result, most of the non-Western nations providing personnel make substantial profits from sending their military personnel to participate in a UN peacekeeping mission because of their low rates of pay.[651] It costs Western nations to

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[649] Jocelyn Coulson, *Soldiers of Diplomacy: The United Nations, Peacekeeping, and the New World Order*, trans. by Phyllis Aronoff and Howard Scott (Toronto: University of Toronto Press, 1998) at 37 [Coulson].

[650] *Ibid.*

[651] For example in 1993, Fiji provided over 1,000 soldiers on two UN missions. For each soldier they received from the UN a reimbursement of $1,048.00 U.S. while paying them monthly salaries ranging from $150.00 to $500.00. Of the estimated Fijian military budget of $26 million $12.5 million was received by Fiji from the UN. Ghana was reimbursed approximately $25 million for the 2,000 of its soldiers participating in two UN missions. The Ghanian military budget was an estimated $47 million for the same time period. *Ibid.* at 37-38.

send their service men and women on UN missions as a result of the significant differences between their national pay rates and UN reimbursement rates.[652]

The reimbursement to governments for troops serving as Blue Helmets began as a result of a UN General Assembly resolution on 29 November, 1974. At that time the rate of payment was set at $500.00 US per person per month.[653]

Since 1974 there have been several increases to the monthly rate, rising to $999.00 in July, 1991 and currently resting at $1,028.00 per month.[654] In addition to the pay and allowances rate for all ranks, there is a $303.00 supplementary payment for specialists, a $68.00 usage factor for clothing and equipment and a $5.00 payment for personal weaponry for a minimal total of $1,101.00 per month (not including the specialist pay).[655]

The reason for the standard rates of reimbursement for all countries parallels one of the principles of international law – equality of nations. It is important to equally compensate the countries for the troops which serve side-by-side in UN missions.[656] Whether or not those soldiers are paid the same is not important for the member nations of the General Assembly. What is critical is that countries are paid the same. As a result the word – reimbursement – is a misnomer in that it suggests that countries are being repaid for an expense which many non-Western nations are not paying out.[657]

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[652] During this same period Canadian soldiers were paid an average of $3,000.00 per month with the difference between this amount and the reimbursed amount paid for by the Canadian taxpayer. *Ibid.* at 38.
[653] *Review of the rates of reimbursement to the Governments of troop-contributing* States, *Report of the Secretary-General*, UN GAOR, 57th Sess., UN Doc. A/57/774, at 3 [UN reimbursement report].
[654] *Ibid.* at 4.
[655] *Ibid.*
[656] *Ibid.* at 3.
[657] In Croatia in 1993, some 900 Nigerian soldiers went unpaid for one year forcing their commanding officer to meet with the Canadian deputy commander of the UN mission and ask for some pay. Major General Robert Gaudreau directed payment and sent the bill to UN headquarters. Coulson, *supra* note 602 at 38.

The trend of non-western nations using peacekeeping funds to sustain their own militaries continues.

To confirm this trend, information with respect to several non-western nations was reviewed. The year 2001 was used for comparison purposes as that is the year for which the numbers for military budgets and detailed monthly country contributions to UN peacekeeping are available. The information is summarized in the following table:

Table 2: UN Reimbursement and Annual Military Budget

Country	Number of Soldiers Contributed to UNPeacekeeping[658] (monthly average)	Reimbursement Received (less any specialist pay)	Annual Military Budget[659]	UN Reimbursement As Percentage Of Annual MilitaryBudget	May 2003 Contribution To UN Peacekeeping (number and ranking of contribution)
Ghana	2,201	$29.1 million	$35.2 million	83%	1944 – 5th
Nepal	747	$9.9 m	$51.5 m	19%	922 – 10th
Zambia	898	$11.9 m	$32.5	37%	887 – 12th
Guinea	793	$10.5 m	$137.6 m	8%	19 – 67th
Fiji	842	$11.1 m	$35 m	32%	238- 33rd

NOTES: 1. The monthly average is based upon the April – December 2001 period for which detailed monthly breakdowns are available.

2. The reimbursement calculation is based upon $1,101 per soldier per month. Specialist pay or other allowances which may have been paid will increase the reimbursement.

Over the three year period, between 2001 and 2003, there has been very little variation in the contribution of these nations to UN peacekeeping missions.[660] This information is summarized in the following table:

Table 3: Peacekeeping Contributions

Country	2001	2002	2003
Ghana	2055	2490	2060
Nepal	1016	1091	921
Zambia	912	910	890
Guinea	792	795	797
Fiji	849	842	240

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[658] UN DPKO, *Monthly Summary of Contributors*, online: UNDPKO http://www.un.org/Depts/dpko/dpko/contributors/index.htm [DPKO Contributors].

[659] U.S., Central Intelligence Agency, *World Fact Book 2002* online: CIA http://www.cia.gov/cia/publications/factbook/docs/notesanddefs.html.

[660] DPKO Contributors, *supra* note 611.

Despite arguments against the use of PMCs being partly based upon their being in business to earn money for their shareholders, an examination of the business of peacekeeping among developing nations shows that many of these nations have discovered that disunity and conflict pays. Not only does it pay for maintaining their troops under the blue banner of the UN but it pays for the cost of operating their militaries at home. The one comment which can be made about PMCs is that they are not in a position to trade their vote at the Security Council for other consideration as was suggested by some of the nations during the debates surrounding the Anglo-American lead coalition into Iraq in 2003.

Loss of Equipment

UN peacekeeping operations have become easy targets for looters. The latest casualty, UNOMIL, has lost its communication equipment, its furniture and its fleet of vehicles after fighting broke out in Liberia. UN spokesperson Sylvana Foa stated: "All reports indicate a frenzy of looting".

In peacekeeping operations in Cambodia, Somalia, Mozambique and the former Yugoslavia, the UN has lost millions of dollars-worth of property. The UN lost all its computers, military vehicles and electronic equipment in the former Yugoslavia. Some of the missing UNPROFOR laptop computers contained information on human rights violations. Overall, 616 vehicles were stolen from UNPROFOR. The biggest single loss happened in April 1994, when $3.9 million was stolen from UNOSOM. UNTAC lost

over $8 million between 1992 and 1993 in stolen trucks, cars, cellular phones and computers. [661]

This looted materiel only served the interests of the belligerents.

Raising Funds

Funding of UN missions remains a problem.

The annual cost of peacekeeping has substantially increased during the 1990s as a result of the increased number of UN missions. Peacekeeping expenses peaked in 1993 at over $3.6 billion (US), dropping to less than $1 billion in 1998.[662] For the year ending 30 June 2003 the UN peacekeeping budget is estimated to have again increased to approximately $2.63 billion with a total of $28.73 billion spent on peacekeeping since 1948.[663] There remain some $1.37 billion outstanding from state contributions.[664]

In 2001, the UN General Assembly decided on a different assessment formula for peacekeeping expenses which is based upon ten levels of contribution by individual nations.[665] This assessment is based upon the average pre capita gross national product of member states with a discount available to less developed nations at the D (20%) to J (90%) levels. The permanent members of the Security Council make up for the discounted assessments. As there is no enforcement mechanism, the success of this new assessment system will be determined in the next several years.

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[661] International Peacekeeping News, Vol 2-01 March April, 1996 online: http://csf.colorado.edu/dfax/ipn/ipn2-01.htm#T-0141

[662] UN Peacekeeping Operations, online: UNPKO http://www.un.org/Depts/dpko/dpko/ques.htm.

[663] UN Peacekeeping Operations, online: UNPKO http://www.un.org/peace/bnote010101.pdf.

[664] *Ibid.*

[665] *Scale of assessments for the apportionment of the expenses of United Nations peacekeeping operations*, GA Res. 55/235, UN GAOR, 55th Sess., UN Doc. A/RES/55/235, at 2-3.

What is clear is that as of 15 March 2003 $1.5 billion remains unpaid in assessed contributions to 10 closed peacekeeping missions.[666] These debts ranged from $150,000.00 owed for the Military Observer Group (MINUGUA) in Guatemala to the $192,613,000.00 owed for the United Nations Protection Force in Croatia.

Cost Effectiveness of UN missions

The cost of each individual mission varies depending upon the mission's mandate, resources being applied to meet the mandate and the willingness of nations to contribute resources to meet the mandate.

The UN mission in Sierra Leone in 2001 cost $612 million.[667] The significant cost of this mission continues.[668] The authorized strength of this mission remains at 17,500 military personnel including 260 military observers. The strength as of 31 March 2003 was 14,549 troops and 255 observers for a total of 14,804.[669]

Of these troops and observers, 12,893 (87%) come from countries who are the 10 highest contributors to UN peacekeeping forces, none of whom pay their soldiers wages at the developed country rate.[670] By way of comparison, Canada has five observers and seven civilian police in place within UNAMSIL.

The critical question is whether the world community has received much value for its almost $700 million a year contribution to the coffers of militaries in countries

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[666] *Updated financial position of closed peacekeeping missions as at 30 June 2002, Report of the Secretary-General*, UN GAOR, 57th Sess., UN Doc. A/57/789 at 8 [UN closed mission report].
[667] Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World's Most Precious Stones* (Boulder, Colo.: Westview Press, 2002) at 161 [Campbell].
[668] The budgeted amount for this mission for the year ending 30 June 2003 is $699.8 million. UN Peacekeeping Operations, Sierra Leone-UNAMSIL-Facts and Figures, online: UNPKO http://www.un.org/Depts/dpko/missions/unamsil/facts.html.
[669] *Ibid.*
[670] UN Peacekeeping Operations, Sierra Leone-UNAMSIL-Facts and Figures, online: UNPKO http://www.un.org/Depts/dpko/dpko/contributors/Mar2003Summary.pdf

with questionable human rights and democracy records. i.e. Nigeria, Guinea, Kenya, and Jordan?[671]

All these troops and observers come from poorly equipped, poorly paid and poorly lead militaries. Jordan's military may be better equipped yet they still struggle with poor pay. An additional issue with members of the Jordanian army is the problem that Canadian peacekeepers observed with Jordanian officers – a proclivity to enjoy sex with young boys.[672]

An example of effectiveness of Nigerian peacekeeping operations is offered from the time when the Nigerian military was part of the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) in Sierra Leone, a regional peacekeeping effort of little positive impact.

In January 1999, during the Revolutionary United Front's (RUF) assault upon the capital city of Sierra Leone, the Nigeria military, after been caught unawares, executed suspected RUF members on the Aberdeen Bridge in Freetown and dumped their bodies into the river. "Anyone remotely suspected of being involved with the RUF was tortured, raped, and summarily executed by the Nigerian soldiers."[673] A number of civilians were also summarily executed by the Nigerians. As a result of the

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[671] Human Rights Watch, online: http://www.hrw.org/africa/index.php.

[672] This observation was as a result of the author's conversation with a Canadian officer serving as a UN peacekeeper in Croatia as part of UNPROFOR. Whenever a conversation was necessary with a Jordan officer and he was not to be found in UN peacekeeping lines, he (they) would always be found along a glass wall erected near a outdoor swimming pool where Bosnian boys were taking swimming lessons. Most swimming lessons – it was standing room only. Other examples were provided to the author of Canadian peacekeepers having to chase Jordan troops away from chasing Bosnian boys on the streets in the towns where the Jordanians were to be protecting the citizenry.

[673] Campbell, *supra* note 667 at 88.

Nigerian involvement in this regional operation, Sierra Leonean citizens began to refer to the initials "ECOMOG" as "Every Car or Moving Object Gone".[674]

Of greatest concern was that the Nigerian soldiers of ECOMOG were then absorbed into the follow-on UN peacekeeping mission (UNAMSIL). The perception that the Nigerians were aggressors and war criminals, made them part of the problem.

The results of a psychological case study of Nigerian ECOMOG soldiers conducted in 1997 confirm a number of concerns.

Not only did this study of forty-eight Nigerian soldiers (officers and enlisted men) find that there were problems in communications between soldiers from anglophone and francophone countries but more importantly, some of these peacekeepers were "unaware of the international human rights declarations, the Geneva conventions and protocols relating to Peacekeeping and war" and were also surprised when some communities "viewed them as looters, rapists and oppressors."[675]

Some of the recommendations of the study also lead one to conclude that these peacekeepers did not realize that civic activities were part of their mission, that they were a disorganized and disorderly organization (especially if one of the recommendations was that "a peacekeeper must understand simple commands and instructions) and that these peacekeepers had earned a bad reputation as a result of engaging in "undesirable activities" including human rights abuse, sale of drugs, arms, and fuel (presumably to the belligerents).[676] One other recommendation was made with respect to additional training in the value system of peacekeepers "so as to reduce the

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[674] *Ibid.* at 89.
[675] Adeniji Temowo, "Africa Case Study: Promoting Psychological Well being Among Peacekeepers" (1998) 27:4-5 Peacekeeping and International Relations 17 at 17 [Temowo].
[676] *Ibid.* at 18.

scale of the social problems relating to the number of illegitimate children left behind by the military forces."[677]

Additional training was the suggested solution although after considering the breadth and depth of the issues raised in this part of the thesis, there are greater issues to be tackled in dealing with these soldiers than additional training.

When the Indian commander of UNAMSIL, Major-General Vijay Kumar Jetly prepared a report setting out the shortcomings of the mission's Nigerian contingent (accusing them of pursuing their own agenda and, as a result, undermining the UN mandate), the Nigerian commander demanded his removal.[678] Shortly thereafter, India withdrew its general and troops.[679]

Ghana had also sent troops to Sierra Leone.[680] In March 2003 there were a total of 931 Ghanaian troops and observers stationed with UNAMSIL. The quality of these soldiers was also cited as another example of the incompetence of UNAMSIL when Campbell suggested that "compared to GhanBatt-3 [Ghana Battalion 3], the RUF could have been a crack team of U.S. Special Forces.[681]

A further comment on the quality of the Ghana soldiers is set out in the UN's own press release of 29 June 2001 which announced GhanBatt-3's UN medal ceremony. The UN medals were awarded to those soldiers "...who completed 90 days

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[677] *Ibid.*
[678] Campbell, *supra* note 667 at 95.
[679] For a detailed account of Indian and UNAMSIL see Alan Bullion, "India In Sierra Leone: A Case of Muscular Peacekeeping?" (2001) 8:4 International Peacekeeping 77.
[680] Ghana is Kofi Annan's home country.
[681] The RUF are characterized by Campbell as "[c]omposed of mostly uneducated youths with no other outlet for their sense of disenfranchisement, the RUF was quickly revealed as an army of murderous thugs rather than justice-seeking rebels." Campbell, *supra* note 620 at 71.

in the Mission without committing an offence..."[682] This same press release notes that the Deputy Special Representative of the Secretary-General congratulated the Ghanian troops on a significant contribution to the peace process and congratulated their work in Kailahun in evacuating child ex-combatants to Daru. "Their efforts, he said, had enabled them to win 'the hearts and minds' of the citizens of the district."

The actions of the Ghanaian soldiers in the Kailahun area (described by Campbell as a "no-man's land" because the fierce fighting had prevented farming and chased away or killed the game that had been present) could hardly be said to have won the "hearts and minds" of the people of Kailahun. Campbell offers one every day example of this when he noted that these troops of a neighbouring country prepared their own meals without the foresight of preparing it hidden from the starving crowd which gathered at the smell of food.[683]

A further little known story of the Sierra Leonean conflict was that no one could be evacuated from areas like Kailahun unless the local RUF commander (in consultation with the RUF's "big chief" in Freetown) would agree.[684] The UN press release also does not tell us as a result of this requirement, few were evacuated and that thousands had been left behind, some of whom died from malnutrition and disease.[685]

Part of this attitude to win the "hearts and minds" of the Sierra Leoneans may be as a result of the Ghanaian participation in the slave trade as traders along with those

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[682] UN, UNAMSIL Press Release, "UNAMSIL's Ghana Battalion 3 Receives UN Medals" (29 June 2001), online: UN www.un.org/Depts/dpko/unamsil/DB/pr290601.htm.
[683] Campbell, *supra* note 667 at 169.
[684] *Ibid.* at 174.
[685] *Ibid.* at 175.

from Nigeria, Cameroon and Côte d'Ivoire.[686] The victims of this slave trade were from the area of present-day Sierra Leone.

What of the qualities of another top state contributor – Fiji?

In reviewing the *coups* in Fiji in 1987 and 2000, Peter Clement concludes that the military's role in the overthrow of two elected governments "has compromised the integrity of the force."[687] He adds that except for the Fijian military's role in peacekeeping there is little need for maintaining the forces as there exists little external threat to Fiji and yet, the UN continues to add these troops to its roster.

Questionable Motives

Members of the international non-interventionist community oppose unilateral humanitarian interventions for the reason that the intervention may be as a result of self-interest or political gain and not humanitarianism.[688] Some of this group would then argue that collective intervention satisfies this concern if the intervention is authorized by the UN or an appropriate regional organization.[689]

This concern may not necessarily be addressed by the use of a regional organization as evidenced by the ECOMOG's involvement in Sierra Leone. Citing a Financial Times report of 9 January 1999, the UN noted that Nigeria, the main troop-contributor to the ECOMOG forces deployed an additional 7,000 soldiers to further

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[686] *Ibid.* at 28.
[687] Peter Clements, "Coups and the Fiji Military" (2001) 30:1,2,3 Peacekeeping and International Relations 1 at 12.
[688] Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed. (Irvington-on-Hudson, N.Y.: Transnational Publishers Inc., 1997) at 228 note 9.
[689] *Ibid.* at 228.

assist the existing 13,000 soldiers in bringing stability to Sierra Leone.[690] The report further indicated that 25% of Nigeria's army would then be stationed in Sierra Leone.

The increase in Nigerian presence in Sierra Leone seemed to coincide "with a worsening economic crisis in Nigeria as a result of a forecast 54% drop" in oil revenues.[691]

Professor McGregor, in his review of peacekeeping in Sierra Leone, concluded that the Nigerians had two motives for their intervention in Sierra Leone – regional security and that "General Sani Abacha also wanted international legitimacy for his discredited military regime."[692]

Commercialization of militaries[693]

On 31 August 1998, the President of the UN Security Council made a statement with respect to the situation in the Democratic Republic of the Congo. He called upon all states "to refrain from any interfere in each other's internal affairs."[694] The Security Council also called for the immediate withdrawal of all foreign forces from the Congo.

This statement was as a result of the presence of soldiers from Angola, Uganda, Rwanda and Zimbabwe.[695] Despite public announcements as to their motives, the real motive for the presence of soldiers of these nations was as the tools for private financial gain by the political elite of these countries.

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[690] "Sierra Leone Peace Hopes Premature" *Financial Times* (4 January 1999) online: UN Association (United Kingdom) and Centre for Conflict Resolution http://www.bradford.ac.uk/acad/confres/monitor/.
[691] *Ibid.*
[692] Andrew McGregor, "Quagmire in west Africa: Nigerian peacekeeping in Sierra Leone (1997-98)" (1999) 54:3 Int'l J. 482 at 482 [McGregor].
[693] Dietrich defines military commercialism as the "strong influence of entrepreneurial considerations as a key component of foreign military deployment." He distinguishes it from militarised commercialism which he defines as "the entrance of military functions (such as contract soldiers) into international commerce". Dietrich, *supra* note 85 at 2 [Dietrich].
[694] UN Security Council, *Statement by the President of the Security Council*, UN SCOR, 3,922nd meeting, UN Doc. S/PRST/1998/26 (31 August 1998).
[695] Dietrich, *supra* note 85 at 1.

After reviewing a number of situations in Africa since the 1960s, Dietrich reached the conclusion that "military and political interference in the affairs of neighbouring countries is the norm" because of the lack of state control beyond the boundaries of the cities where rulers of various countries tend to have their seat of power.[696] He noted that in Sub-Saharan Africa "military involvement in a variety of unofficial and official domestic commercial activities has increased since independence"[697] and that examples of the range of this type of activity is broad, ranging from bribery at roadblocks to military dictatorships in command of the formal state economy.

In an attempt to categorize military-economic endeavours, Dietrich then notes that the nature of the state military falls within one of three models of civilian-military relations. These models are:

1. mainstream Anglo-Saxon practice – strict separation between the military and politics and the economy with the resulting separation of military members from other involvement in the economy until after their departure from the military (although a recognition that some moonlighting is carried on by lower paid ranks);

2. Hispanic civil-military culture – resulting from the historical role of conquistadors (having both a military role and a legitimate and substantial role in commercial enterprise and politics). The militaries of Latin America, especially since the end of the Cold War, own companies and take part in politics to a significant degree. In Nicaragua retired officers and the military own such businesses as Associated Nicaraguan Contractors, Inc., Impact Warehouses, Loan Bank, Cereal and Vegetable Supermarket. El Semillal Shrimp Company; and

3. Russian entrepreneurial military role – soldiers of all ranks being forced into illegal activities, moonlighting or selling military equipment to supplement their low state salaries. The result

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[696] *Ibid.* at 12.
[697] *Ibid.* at 2.

> has been that soldiers with special forces training serve as body guards for mafia members or senior officers engaging in black-market sales of military equipment. Such activities are carried out primarily by individuals or group of individuals and do not reflect official government policy.[698]

These models have significant implications for the UN's use of militaries from nations which fall within the latter two models.

Another interesting example of the military of a permanent member of the UN Security Council taking matters into their own hands as a result of in the state economy is that of the Chinese People's Liberation Army (PLA).

Logan Wright noted that there has been a change from a Cold War ideological motive of Chinese arms sales to African nations to a for-profit motivation which has been as a result of the PLA need to supplement the official defence budget of China.[699] Prior to China moving to meet World Trade Organization (WTO) requirements of privatization of a large number of its state-owned enterprises, the PLA was heavily involved in many domestic businesses and remains involved in approximately 20,000 businesses, contributing 3 per cent to the Chinese gross domestic product in the mid-1990s.[700] Nonetheless, this is not a core function and "'national security considerations are of paramount importance'".[701]

This separation of interests is not evident in many African militaries.

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[698] *Ibid.* at 2-3.
[699] Logan Wright, "Seizing An Opportunity: The Changing Character of Chinese Arms Sales to Africa" *Armed Forces Journal International* (October 2001) 92 at 92 [Logan].
[700] Dietrich, *supra* note 85 at 3.
[701] *Ibid.*

Dietrich suggests that the reason for the patrimonial system to have developed in Africa is the need for African leaders to buy off the militaries' officer corps to prevent *coups*.[702]

Nigerian soldiers, of all ranks, have become increasingly involved in moonlighting both in domestic business activities and during deployments in other nations.[703] Through numerous *coups* and the significant involvement of military leaders in the Nigerian economy there has developed in the Nigerian military a lack of separation between their careers as soldiers and their entrepreneurial tendency to bolster their salaries. Junior members of the military tend to involve themselves in looting, running taxi services and taking advantage of the natural resources of the countries to which they deploy while more senior officers appear to be in positions to receive patronage payments as a result of the state revenue from the Nigerian oil industry.[704]

This entrepreneurial spirit has been most evident in the ECOMOG deployment in Liberia and Sierra Leone.

During the regime of General Sani Abacha[705] Nigerian officers found themselves in command of the ECOMOG in Liberia. They went into business for themselves by dismantling Liberia's rolling stock, mining equipment and public utilities and selling them abroad.[706] Local diamond mining deals were made with various

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[702] *Ibid.* at 4.
[703] *Ibid.* at 5.
[704] *Ibid.*
[705] Ruled Nigeria from 1993 until his death in 1998. One of a string of seven career soldiers who have ruled Nigeria for 28 of its first 38 years of independence. Abacha seized power from a civilian-led interim government and kept himself in power by implicating junior officers and retired rivals in alleged coup attempts and having them convicted in secret trials. James Rupert, "Nigerian Ruler Dies After Brutal Reign" *Washington Post* (9 June 1998) online: Washington Post http://www.washingtonpost.com/wp-srv/inatl/longterm/nigeria/stories/abacha060998.htm.
[706] Bill Berkeley, *The Graves are not yet full: Race, Tribe and Power in the Heart of Africa* (New York City: Basic Books, 2001) at 54 [Berkeley].

criminal factions in Liberia. When one of the local Nigerian ECOMOG commanders, who had made such an arrangement, was rotated home, the new officer refused to comply with the terms of the mining agreement and tried to disarm the soldiers of the local warlord. The ECOMOG soldiers were attacked and sixty were killed.[707]

In Angola, generals either establish their own private security companies or become shareholders in Angolan subsidiaries of international private security companies.[708] In the mid-1990s the armed forces of Angola also became involved in diamond mining through the establishment of companies such as Lumanhe (owned by retired Angolan generals). When the Angolan military deployed against the UNITA forces in the Angolan province (the heaviest concentration of diamonds) what often happened was that instead of fighting, each side mined diamonds on opposite sides of the river from one another.[709]

This spirit of entrepreneurship continued in the Angolan military's deployment into the Congo. "Commercial opportunism by officers came to be a substantial ingredient" of this deployment despite Angola having strategic reasons for assisting Kabila against UNITA allies – Rwanda and Uganda.[710] This opportunism is not only expressed through the organized looting by Angola troops in the Congo, but the Angolan national petroleum company, Sonongol, was awarded exploration concessions and marketing deals in the Congo thereby continuing a flow of profits for the Angolan elites.

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[707] *Ibid.* at 55.
[708] Dietrich, *supra* note 85 at 5.
[709] *Ibid.*
[710] *Ibid.*

Dietrich concludes that this military commercialism is emerging as a disturbing trend amongst the militaries in Nigeria, Angola, Rwanda, Uganda and Zimbabwe. In the latter three countries it appears that "commercial ventures have become a core consideration in strategic planning" and are closely tied into the central role of patrimonialism in African society.[711]

The patrimonial system was based upon foreign aid paid to corrupt and undemocratic governments during the Cold War. When Africa's place as part of the Cold War client state system disappeared so did much of the foreign aid. This gave rise to the an accelerated implosion of weak states "as leaders could no longer service their patronage networks,[712] giving rise to competing warlords and state collapse."[713]

As these leaders looked to sources of income or land distribution (Zimbabwe) to support their patronage process, the natural resources of neighbouring states lead to an increase in "predatory behaviour, hidden behind legitimate political and military concerns"[714]

Therefore the façade of stabilization of neighbouring nations has given way to "stronger country's elites…us[ing] the façade of the neighbouring failed state's structure to legitimise illicit transactions."[715]

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[711] *Ibid.* at 6. For additional information about neopatrimonial politics in Liberia and Sierra Leone and how this is an important cause of the warlike conditions in these two countries see Morten Bøås, "Liberia and Sierra Leone – dead ringers? The Logic of Neopatrimonial Rule" (2001) 22:5 Third World Quarterly 697.

[712] Family and kinship ties serve as "conduits and means for running patronage networks" and the trend in the Zimbabwe Defence Force and the Ugandan People's Defence Force use soldiers to secure profits. *Ibid.* at 7.

[713] *Ibid.* at 6.

[714] *Ibid.* at 6.

[715] *Ibid.* at 6.

Not only are national militaries used as part of this patronage process, but entrepreneurs and senior members of the government are involved in the process of destabilisation of neighbours.

In the Congo, a Zimbabwean born entrepreneur, Billy Rautenbach was involved in a highly unusual contract which transferred state assets from the Congo to one of his Virgin Islands-based corporations.[716] The Zimbabwean Justice Minister and treasurer of the ruling party, Mnangagwa, attended the meeting between the president of the Congo and Rautenbach and has been identified by Africa Confidential as Rautenbach's sponsor in the Congo.[717]

In 1998 a company (Osleg) was established in Zimbabwe to purchase diamonds and gold from articinal Congolese producers. This was to be completed in cooperation with Congolese military officers. The corporate mandate was to generate some $5 million in monthly trade to ensure the cost of the Zimbabwean presence in the Congo was covered.[718] This company's shareholders were General Zinavashe and Job Whabira, the permanent secretary of the Defence Ministry.

Uganda and Rwanda's senior military officers and governmental officials are also implicated in similar dealings. Senior military officers were denounced for smuggling Congolese goods by the Ugandan Revenue Authority which indicated there were "121 freight companies, some of them connected with the Army, which had been mysteriously licensed to operate unscheduled flights between Uganda and Congo."[719]

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[716] *Ibid.* at 7.
[717] *Ibid.* at 7.
[718] The Defence Minister stated that "[w]e saw this as a noble option. Instead of our army in Congo burdening the treasury for more resources, which are not available, it embarks on viable projects for the sake of generating the necessary revenue." *Ibid.* at 8.
[719] *Ibid.*

Rwanda's involvement has been more carefully hidden with the operations of a company, Tristar, being involved in "as many as 10 flights in Kigali from the Congo with most of the goods sent directly to Europe."[720]

There is also evidence that entrepreneurship does not only rest in the higher levels of state government and militaries.

There is evidence that Ugandan and Rwandan occupation forces have regularly extorted protection money from business people operating in war zones, granted mining concessions in the occupied areas, utilized a puppet regime from amongst the different warlord factions in the area and let them issue permits and extracted payments.[721]

The immediate effect of these machinations is felt in many ways. First it "increases the inclination of field commanders and their subordinates towards warlordism", junior officers and soldiers are provided an example of how to function during a deployment and then transfer these skills into theatres such as Bosnia,[722] "traditional military strategy diminishes in importance as favourable access to financial rewards becomes a key function of deployment".[723] Dietrich suggests that the taste for readily acquired booty has lead to pressure upon the deploying governments to maintain the income acquired by soldiers of all ranks by either increasing patronage payments or by embarking on a continuous stream of external deployments.[724]

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[720] *Ibid.*
[721] *Ibid.* at 8-9.
[722] During a conversation with a Canadian officer, it was indicated to the author that Canadians in Bosnia have, at various times, spent almost as much time policing their fellow peacekeepers (as Kenyans were selling UN paid for and delivered gasoline to the belligerents) as in policing the belligerents.
[723] *Ibid.* at 9-10.
[724] McGregor suggests that ECOMOG deployments were offered as carrots to disaffected Nigerian units and officers as they were paid according to the higher ECOMOG pay-scale, which was a significant improvement over the pay scale at home. McGregor also agrees that the additional bonus to these deployments for the Nigerian government was that it kept suspect units and officers out of the country for extended periods of time. McGregor, *supra* note 692 at 496.

Leaders of nations, whose military has not deployed to a large degree in a victim nation, also have contributed to the instability of many African states.

The political and economic elites of Togo and Burkina Faso have been cited in the UN Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA as being major purchasers of Angolan diamonds.[725] The presidents of both countries are particularly cited in the report.

Forgotten in all the commercial activity is the victim nation and its peoples.

Third World UN Peacekeeping Failure – UNAMSIL (Sierra Leone)[726]

This UN peacekeeping mission was destined to fail from the moment of its inception primarily because many of the soldiers who were part of the disgraced ECOMOG force simply transferred their allegiance to the UN flag.

On 22 October 1999, UNAMSIL was established pursuant to UN Security Council Resolution 1270.[727] Its mandate included providing assistance to the government of Sierra Leone in implementing the disarmament, demobilisation and reintegration plan, ensuring the security of UN personnel and providing support to elections which were to be held.[728] On 7 February 2000 this mandate and the size of the mission expanded pursuant to UN Security Resolution 1289. The mission was now

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[725] J. Andrew Grant, "The Role of Diamonds and Oil in Angola's Civil War" (2000) 15:3 Int'l Insights 99 at 103-104 [Grant].

[726] For a detailed review of this mission from the Indian perspective see Alan Bullion, "India in Sierra Leone: A Case of Muscular Peacekeeping?" (2001) 8:4 International Peacekeeping 77. The Indian commander of the UN mission denied that he had submitted report to the UN offices in New York reporting Nigerian officials being directly linked to the diamond trade in Sierra Leone. He did not deny reports that he was having difficulty in his Nigerian second-in-command and the Nigerian Secretary-General's Special Representative disobeying orders. *Ibid.* at 78.

[727] Malan-Layered, *supra* note 87 at 7.

[728] *Ibid.*

authorized to take whatever actions were necessary to enforce the earlier resolution and increase the number of troops from 6,000 to 11,000.[729]

The mission elements included soldiers of Kenya, Ghana, Guinea, Nigeria, India, Jordan, Bangladesh and Zambia while Western nations provided a few military observers.[730]

In a scathingly frank report it's mission commander commented that units from most of the nations serving on this mission arrived for duty with very little or no equipment with them (including two of the nations [Nigeria and Guinea] which had already been serving in Sierra Leone as part of the failed ECOMOG mission).[731]

In addition to the lack of equipment and training "the troops do not have the mental attitude or the will to fight the rebels when the situation so demanded".[732] This led to increased deaths in the civilian population as the RUF rebels then felt that they had little to fear from the United Nations especially after two incidents where Kenyan and Guinean soldiers surrendered their weapons and equipment to the rebels instead of disarming the rebels as the mandate read (lack of MacInnis coercive capability). Even after the second resolution, some 500 UN peacekeepers were taken as hostages by the RUF forces, several Kenyan soldiers were killed as a result of an assault upon a UN camp and the equipment captured along with the UN peacekeepers (including 13 armoured personnel carriers) were they used against the government of Sierra Leone.[733]

Not all the blame could be affixed to the level of training of the soldiers. The mission commander adhered to a soft approach to peacekeeping where peacemaking

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[729] *Ibid.* at 8
[730] *Ibid.*
[731] *Ibid.* at 12.
[732] *Ibid.*
[733] *Ibid.* at 10.

should have been the order of the day.[734] Whether the commander was guided by his real beliefs or whether his statement was guided by the skill level of the soldiers under his command will not be known. What is known is that the RUF was not encouraged to disarm and continued to commit atrocities.[735]

The cycle of violence only stopped when a British force was dispatched to Sierra Leone under the guise of protecting British nationals.[736] Not only did the British battalion of paratroops attend to the safety of British nationals, they defended parts of the capital city, the airport, patrolled the streets of the capital, sat in on UN planning sessions and assigned a full-time advisor to the Sierra Leonean military.[737]

The world but, specifically and more importantly, the people of Sierra Leone received all this and more of the same kind of life they had experienced for several years at the cost of US $1.5 million a day. Despite the pleadings of the UN Secretary General for the involvement of Western nations, the United Kingdom and the United States continued to work towards a solution of the problems in Sierra Leone, however, they chose to work outside the UN process.

Contrast this with the success of Executive Outcomes.

This intervention may have been, at the same time, a controversial intervention, but by all accounts (less those from the RUF bands) it was also a most effective one.[738]

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[734] *Ibid.* at 9. Major-General Jetley stated that "peace is already here: we don't want to shred it ... a peacekeeper's role is very delicate ... restraint and neutrality are the watchwords."
[735] *Ibid.*
[736] *Ibid.* at 10
[737] *Ibid.* at 11.
[738] *Ibid.* at 3.

This South African based PMC was originally hired by the Sierra Leonean government and deployed 160 personnel in Sierra Leone between May, 1995 and March, 1996.[739]

During this short contract this PMC trained company-sized army elements, enlisted the support of the Kamajors, provided helicopters and other fire-support to EO led missions against the RUF, lifted the RUF siege of the capital, destroyed the RUF headquarters to the east of the capital, and secured the Koidu diamond area for the government.[740] This PMC was regarded by both the government of Sierra Leone and by its people as a crucial stabilising factor which led to the initiation of peace talks on 22 February, 1996.[741]

The contract with Executive Outcomes was terminated in accordance with peace talks between the new government of Sierra Leone and the RUF. A UN observer mission was to have deployed upon the departure of Executive Outcomes

4.3 – The Use of PMCs

This section of Part 4 will review a number of critical factors which all lead to the conclusion that the use of PMCs is simply an additional development in the Revolution in Military Affairs which has already been put into practice by many if not most militaries around the world. We shall briefly consider the use of outsourcing by three western militaries, the cost effectiveness of PMCs, the current world security environment and the use of PMCs as part of the international tribunal enforcement system.

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[739] *Ibid.*
[740] *Ibid.*
[741] *Ibid.*

Outsourcing

Outsourcing is the transfer of a company's or government's "recurring internal activities and decision rights to outside providers." [742]

Corporate outsourcing of goods and services began to be widely used in the 1980's.[743] "In 2000, more than $1 trillion U.S. was spent globally on outsourcing" and that by 2005 outsourcing of IT worldwide is expect to "top $700 billion".[744]

Militaries around the world continue to embrace outsourcing as part of the revolution in military affairs (RMA) and RMA's review of military logistic systems. Outsourcing of goods and services is not a new issue for militaries. In the 18th century, contractors provided the British forces in North America with food, clothing, shelter, and labour.[745] The Canadian government, in particular, the Department of National Defence (DND), is also part of the more than $1 trillion U.S. spent annually on worldwide outsourcing.

In an October 25, 1999 speech to the Toronto Board of Trade, the then Chief of the Defence Staff (CDS), General Maurice Baril, confirmed DND's routine contracting for services with the private sector for services previously performed in-house and advised that this trend would continue into the future.[746]

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[742] Maurice F. Greaver, II, *Strategic Outsourcing; A Structural Approach to Outsourcing Decisions and Initiatives* (New York City, N.Y.: American Management Association, 1999) at 3.
[743] Kevin R. Maromonte, *Corporate Strategic Business Sourcing* (Westport, Conn.: Quorum Books, 1998) at 1.
[744] David Petras "Outsourcing is like selling part of company" *The Kitchener-Waterloo Record* (25 September 2002) online: The Record http://www.therecord.com at F2 [Petras].
[745] Stephen P. Ferris and David M. Keithly, "Outsourcing the Sinews of War: Contractor Logistics" (2001) 81 Military Review 72 at 74 [Ferris].
[746] General Maurice Baril, "Canadian forces, business and industry" (Paper presented to Toronto Board of Trade, 25 October 1999) online: D-Net http://www.forces.gc.ca/eng/archive/speeches/25OctBaril_s_e.htm [Baril].

To assist the CF in meeting its North Atlantic Treaty Organization (NATO) obligations in Bosnia, DND signed a contract with the Canadian company ATCO-Frontec to provide logistical, communications and engineering support to the Canadian Forces (CF) in Bosnia.[747]

Armed forces around the world are increasingly becoming reliant upon civilian contractors for not only logistical support (part of the tail) but also for supporting many of today's weapon systems (and becoming part of the tooth).

PMCs are a consequence of the ever widening movement towards the privatization of state activity in almost all fields.

Outsourcing – United States and British militaries

The United States has a long history of the use of contractors on the battlefield beginning with the Revolutionary War.[748] During the 1990/91Operation Desert Shield/Desert Storm, one out of every 36 deployed personnel was a civilian contractor.[749] This number included 34 contractor employees who crossed into Iraq with the U.S. forces during the ground offensive.[750]

In addition to the operations in Bosnia, every major U.S. military operation in the 1990's (Somalia, Haiti, Zaire and Kosovo) has seen increasing support from civilian contractors.[751] Civilian contractors are not only part of the tail of the United States military but they are increasingly becoming part of the tooth. This is as a result of

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[747] Allison Delaney, "Civilian contractors to augment CF peacekeepers in Bosnia" *Maple Leaf* (14 June 2000) online: http://www.dnd.ca/menu/maple/vol_3/Vol3_22/headline_e.htm [Delaney].
[748] Michael J. Davidson, "Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield" (2000) 29 Pub. Con L.J. 233 at 234 [Davidson].
[749] Lisa L. Turner and Lynn G. Norton, "Civilians at the Tip of the Spear" (2001) 51 A.F.L. Rev. 1 at 7 [Turner].
[750] Davidson, *supra* note 748 at 243.
[751] P.W. Singer, "Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry" online: http://www.brook.edu/dybdocroot/views/articles/singer/20020128.pdf at 4 [Singer].

contractors providing services more closely linked to combat including aerial surveillance (Kosovo) and operating the computer and communications systems for NORAD in the Cheyenne Mountain base.[752] The trend for greater contractor support will increase in the 21st century.[753]

The government of Great Britain has also recognized that there was a need for increased involvement of the private sector in the provision of goods and services to British armed forces.

The recent British Strategic Defence Review (SDR) noted that "[s]uccess in operations will also continue to depend on the contribution of civilians working for the Ministry of Defence, and contractors providing support"[754] and acknowledged the key role which civilians are performing not only in the United Kingdom but also in operational areas, especially, as a result of the increasing tempo of overseas operations.

Outsourcing is one of several programs with this type of services contract being of five to seven years duration. An example of an outsourcing contract is that signed between the MoD and BAE SYSTEMS in October 2002 for maintenance of the military's long range reconnaissance aircraft – the Nimrod.[755]

Outsourcing – Canada

In late 2002, DND issued two press releases which indicate the increased reliance of the Canadian military upon contractors during operations.

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[752] *Ibid.*
[753] Turner, *supra* note 749 at 1.
[754] U.K., Ministry of Defence, *The Strategic Defence Review: A New Chapter* (London: The Stationery Office, 2002) at 20 [SDR].
[755] U.K., Ministry of Defence, Press Notice, " MoD awards BAE SYSTEMS £75 million Nimrod contract" (8 October 2002).

On October 7, 2002, a press release advised that the Canadian Task Force, part of NATO's Stabilization Force (SFOR) in Bosnia and Herzegovina (BH), was now composed of some 1,200 military and 200 Canadian civilian personnel (an indication that the ATCO-Frontec contract's option for a third year had been exercised).[756]

On December 19, 2002, DND announced another outsourcing contract valued up to $400 million over a 10 year period.[757] Pursuant to this contract, SNC-Lavalin/PAE is on 90 days notice to provide a full range of support services to overseas CF operations. This contract was signed pursuant to the Canadian Forces Contractor Augmentation Program (CANCAP).[758] In making this announcement the Minister of National Defense noted that military personnel would be used in hostile environments but, when matters stabilized, the private sector would be called in to provide services.

The CANCAProgram was put in place as a result of a combination of the 1990's 30% downsizing of the CF, budget reductions and increasing operation tempo (1948-1989 – 25 deployed operations, 1989-1999 – 65[759])[760] which all served to stretch the Canadian military's logistical capabilities.

The aim of this program is to "establish a contracted civilian industry capability to support CF deployed operations abroad."[761] As a result, a representative of the civilian contractor will need to be available to deploy on an operational reconnaissance

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[756] Department of National Defence. News Release, "Change of Command for The Canadian Task Force in Bosnia and Herzegovina" (7 October 2002).
[757] Department of National Defence. News Release. "Defence Minister Announces Contract for Support to Deployed Military Operations" (19 December 2002).
[758] The Canadian program is different from the American LOGCAP program in that LOGCAP contemplates the use of civilian contractors "during wartime and unforeseen military emergencies". See Davidson, *supra* note 748 at 237.
[759] Baril, *supra* note 746 at 3.
[760] Department of National Defence, *CANCAP Project Charter 2001* (Overview) online: http://www.forces.gc.ca/j4log/cancap/proj_chart/main_e.htm at 1 [CANCAP].
[761] *Ibid.* at 2.

within 96 hours of notice from the CF. The contractor is also to have the management in place within 60 days and be prepared to provide services within 90 days.[762]

Conclusion

During the 21st century and as downsizing continues, western militaries will increasingly rely upon civilian contract employees to provide an increasing range of goods and services. The services being provided will continue to put civilians in harm's way and will potentially lead to violations of the present *jus in bello*.

It is also clear that the Canadian Forces will continue to outsource many services. Canadian companies are also providing not only the basic logistics required by any military in an operational setting, but also more goods and services at the sharp or combat end of military operations.

Cost of PMC Use

In 1995, the government of Sierra Leone hired the PMC firm, Executive Outcomes (EO) to assist it to defeat the RUF. Reports vary as to the value of the contract. Some note that the cash value was $35 million.[763] There were two ways the government of Sierra Leone was going to pay for the services of EO – cash and diamond concessions. In early 1997, EO was forced out of Sierra Leone (as a result of the condition of the treaty signed between the government and the RUF) and left being owed $19.5 million which was to be repaid at the rate of $600,000 per month until December 1999.[764] Branch Energy Limited (a subsidiary of DiamondWorks Limited of

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[762] *Ibid.* at 3.
[763] Francis, *supra* note 507 at 331.
[764] *Ibid.*

Vancouver), connected with EO,[765] was granted Kono diamond mining rights three months after EO arrived in Sierra Leone.[766] When a new mining code was announced by the Sierra Leonean government on 14 July 1998, Branch Energy was exempted from the new policy which stated that a Sierra Leonean would have to have a 25% share in mining projects operated by foreigners.[767]

Effectiveness of PMCs

Sierra Leone

First to arrive in Sierra Leone were the Gurkha Security Guards (GSG) who were sub-contracted to do this work by the UK-based J & S Franklin company.[768] The terms of the contract were that they were to train the Republic of Sierra Leone Military Forces (RSLMF). By March, 1995 the capital city was in danger of being overrun by the RUF because the GSG were not prepared to take on new and more invasive tasks even after their commander had been killed in an ambush.

In March 1995, Executive Outcomes (a South African based company) was hired by the NPRC government to train the RSLMF, provide logistical support and to conduct offensive operations against the RUF.[769] The cost of the contract was $1.225 million per month and diamond mine concessions.[770] The original contract was for the May 1995 to March 1996 period and EO was to deploy 160 personnel.

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[765] Tony Buckingham, an ex-British army officer runs Sandline International (the successor of EO) and is the majority shareholder in DiamondWorks Limited. McGregor, *supra* note 692 at 488.
[766] Branch Energy paid the government $250,000 per year as rent and the government takes 5% of the value of all the diamonds mined and 37.5% of the net profits. Francis *supra* note 507 at 331.
[767] *Ibid.*
[768] *Ibid.* at 326.
[769] *Ibid.*
[770] Malan - Layered Response, *supra* note 87.

EO recommended three objectives for their involvement. All three were accepted by the government and with the assistance of trained RSLMF soldiers, Kamajor militia, and EO's arsenal of Mi-17 fighter jets and Mi-24E transport and gunship helicopters and Soviet built BMP-2 armoured personnel carriers, the objectives were met within a few months.[771]

EO's support of the Sierra Leonean government had two immediate effects. The first was that it immediately introduced stability to a nation which had not seen any for some time. This allowed democratic elections to be held in February and March 1996. The second effect was that it forced the RUF to the negotiating table which lead to the signing of the Abidjan Peace Accord on 30 November 1996.[772] RUF's precondition to signing the peace accord was that EO was to leave Sierra Leone. Despite continuing security concerns, the EO contract was terminated on 31 January 1997. Four months later the civilian government was overthrown by the military.

Security Environment

It is trite to say that if there was no violent conflict there would be no need of armed force. The unfortunate reality is that armed conflict continues to be a form of conflict resolution. Despite throwing off the yoke of colonialism, countries in Africa and other parts of the world remain in constant violent conflict. Rarely a week goes by

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[771] The objectives included evicting the RUF from around the capital city, stabilizing the Koidu diamond area and destroying the RUF headquarters. Francis, *supra* note 483 at 327. Some accounts of the arsenal owned by EO include: armoured personnel carriers with 30 mm cannons, Soviet-built BTR 50 amphibious armoured personnel carriers, four-barrel 7.62 mm and 0-A-622 machine guns, Land Rovers mounted with anit-aircraft guns, ammunition, and artillery, radio intercept systems, Boeing transport planes, Andover transport planes, Mig-23 jet fighter-bombers, Swiss Pilatus training planes converted to fire air to ground rockets, Soviet Mi-8 helicopters, SNEB rocket pods, and 68 mm 40A rockets. J. Zoë Wilson, "Out of the Shadow of Good and Evil: A New Methodology for Understanding Mercenarism" (2000) 15:3 International Insights 38 at 55 [Wilson].

[772] Ibid. at 326.

without the United Nations Office for the Coordination of Humanitarian Affairs issuing an Emergency Report on violent conflict somewhere in Africa.

Since the end of the Cold War and Africa's place as an important proxy in the battle between Cold War protagonists, one would have expected armed conflict and violence to have been reduced.

The only aspect which has changed in African conflicts was the elimination of the proxy component. "Contrary to popular belief, ethnic or religious identity, although used as instruments to define and motivate antagonistic groups, do not appear to provide independent bases for violence."[773] Professor Strydom concludes that causes of conflict or rebellion are "more often than not an economic activity with pay-offs akin to crime."[774] He goes on and adds that "what we gather from recent studies, is that conflict-ridden spaces in Africa are not filled with leadership elites with visions of rescue operations in the interest of state-formation and post-conflict peace-building, but with patronage networks that thrive on the economic rewards of disorder."[775]

Earlier in this Part of the thesis, especially in the section dealing with the commericialization of militaries, we considered a number of problematic issues touching on peacekeeping. These issues all arise as a direct result of the nation-state environment which lends itself to the development and perpetuation of the patrimonial system. This system supports the development and maintenance of the warlord system not just in Africa but in conflicts such as in the Former Republic of Yugoslavia.

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[773] Hennie Strydom, "United Nations sanctions and Africa's wars of enrichment" (2001) 26 S.A.Y.B. Int'l L. 41 at 43 [Strydom].
[774] *Ibid.*
[775] *Ibid.* at 45.

Professor Knight calls it critical for the UN to develop a capability to "distinguish peacekeeping from enforcement actions"[776] and to develop the resources to apply rapid reactive and coercive force to conflict situations falling outside of peacekeeping and collective action. Although his suggestions are that these forces be based upon some of the bodies already considered in this thesis, it is this author's contention that PMCs would and could meet this requirement.

In this war over personal wealth a stabilizing force is required which can be beyond the reach of governmental interference.[777]

The Integration of PMCs into the Continuum of Conflict

Various scholars have considered conflict and reaction to conflict as continuums. It is important to review the various stages of conflict in order to ensure that the right resources are applied at the right time in the right place by the right organization or body and to answer the questions as to when could PMCs be employed.

Despite some successes in the use of PMCs by governments to stabilize situations where the governments were about to be overrun (Sierra Leone and Angola), numerous scholars have often used the return of instability and chaos when the PMC was forced to withdraw (Sierra Leone agreement between the government and RUF) as an important element of the argument against the use of PMCs. Other arguments such as those of Drs. Musah and Fayemi, against the use of PMCs are partly based upon the proposition that PMCs are "only a stopgap measure" and that the peace they bring is "tenuous because the dialectics of hostility, suspicion, and violence were barely

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[776] W. Andy Knight, *Adapting the United Nations to a Postmodern Era* (Chippenham, U.K.: Palgrave, 2001) at 247 [Knight, Adapting].

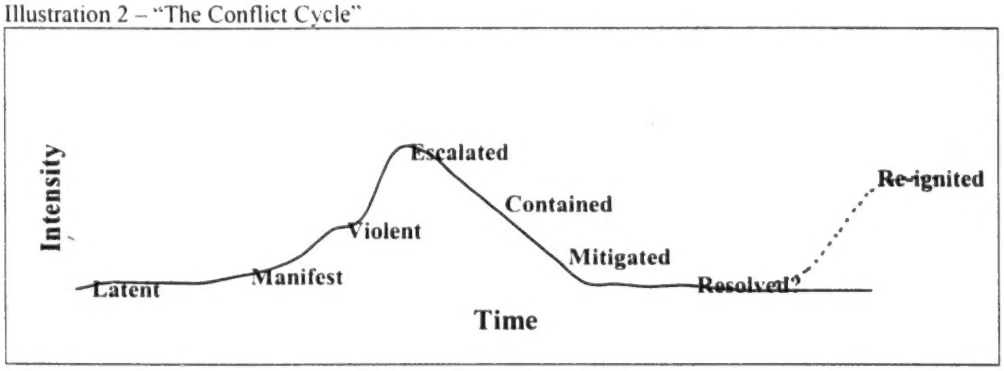
[777] Evident when the Indian general commanding the UN peacekeeping forces was set to file a scathing indictment of the Nigerian forces under his command.

addressed by the standard conflict management package prescribed by groups like EO."[778]

As noted by Professor Taulbee in Part 4 of this thesis, PMCs provide those services which a government desires and contracts for, and this writer's position is that the failure of the UN and other international organizations or states to be able to react quickly and effectively to a developing situation needs to be addressed quickly. Something new is required. Therefore, in this section we will explore the continuum of conflict and suggest places where the services of a PMC can be used to address this noted shortcoming in current intervention operations.

Dr. Bjørn Møller of the Copenhagen Peace Research Institute (COPRI) offered an illustration to explain the continuum or cycle of conflict at a conference in Uganda in July 2001.[779]

Illustration 2 – "The Conflict Cycle"



[778] Abdel-Fatau Musah and J. 'Kayode Fayemi, "Africa in Search of Security: Mercenaries and Conflicts – an Overview" in Abdel-Fatau Musah and J. "Kayode Fayemi, eds., *Mercenaries: An African Security Dilemma* (London: Pluto Press, 2000) 13 at 28.

[779] Bjorn Moller, "Conflict Prevention and Peace-Building in Africa" in Danish Ministry of Foreign Affairs, *Conflict Prevention and Peace-Building in Africa: Report from the Maputo Conference 29-29 June 2001* (Copenhagen: Ministry of Foreign Affairs, 2001) 64 at 68.

This illustration was offered by Dr. Møller in order to discuss the options available to end conflict as "conflicts tend to evolve in a cyclical pattern."[780] Møller defines these phases as follows:

1. latent phase – when the conflict is still dormant and "barely expressed by the conflicting sides."[781] In fact the potential belligerents may not even be aware of their conflicting interests;
2. manifest phase – the conflicting sides express their demands and it is easier to identify both problems and potential belligerents;
3. violent phase – when blood is spilled;
4. escalation phase – violence breeds further violence;
5. contained phase – violent struggle continues but intensity abates;
6. mitigated phase – basic causes of conflict remain, but the conflict itself is significantly altered resulting in less violence and "more political mobilization and negotiation; and
7. resolution phase – the period when "the underlying causes of the conflict" and consequences are addressed.[782]

Møller suggests that although it may be best to intervene during the latent stage it may be difficult to justify any intervention as its success seemingly would have prevented something from happening which might not have happened anyway.

Møller notes that the manifest phase may provide the best opportunity to take preventive action although the time for preventative action may be short as during this phase the "conflicting sides tend to exhibit conflict behaviour and regroup themselves in opposing camps, often (but not always) defined in ethnic terms."[783]

He submits that intervention during the violent or escalation phase may be too late as the leadership of the parties in conflict often have their own private agendas and are "personally profiting from the continuing struggle."[784] As the violence escalates

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[780] *Ibid.* at 67.
[781] *Ibid.*
[782] *Ibid.* at 69.
[783] *Ibid.* at 68
[784] *Ibid.*

"the more the warring parties (and especially their leaders) have to lose by laying down their arms."[785]

An interesting insight into the stages of what appear to be ethnic wars during the 1990s, was offered by Professor John Mueller where he considered the conflict in the Former Republic of Yugoslavia (FRY) and in Rwanda in 1994. He noted that what may have been identified as ethnic warfare "seems to have been something far more banal: the creation of communities of criminal violence and pillage."[786] A review of Mueller's stages is particularly relevant as he concludes that with fewer inter-state wars being waged by regular soldiers, low intensity conflict is the "only kind still going on – war by thugs is the residual, not the emerging, form" of conflict.[787]

Mueller suggests four stages to this process including:

1. takeover – when thugs fill the vacuum of civil disorder;
2. carnival – when the thugs exercise absolute power over "their small fiefdom" and otherwise non-violent citizens opportunistically join in the murder and pillage;
3. revenge – where those who were brutalized during stages one and two join in a stage one takeover in a more hospitable part of the country with people "being dominated by vicious bigots of one's own ethnic group" or by those of another; and
4. occupation and desertion – the period when life becomes miserable for all who live under the control of the thugs (i.e. – the thugs and their followers occupy the best homes whomever may have lived there before and as in Srebenica, inflating the size of the population to then hoard the extra food stuffs "to drive up the prices before selling it on the black market at a killing." Anyone opposed to this arrangement would be killed.[788]

What is particularly relevant to the thesis is Mueller's discussion of the first stage – takeover.

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[785] *Ibid.*
[786] John Mueller, "The Banality of "Ethnic" War (2000) 25.1 International Security 42 at 53 [Mueller].
[787] *Ibid.* at 70.
[788] *Ibid.* at 53-57.

Prof. Mueller concludes that it is during this stage when armed thugs, recruited and/or encouraged by politicians emerge from jails and from the population where they otherwise blended in, to take charge of a situation where lawlessness seemingly prevails. This emergence is often as a result of a lack of the former civil order taking charge or "where the police actually or effectively were in alliance with them."[789]

After reviewing both fact situations, Professor Mueller draws several conclusions including: that policing the violence would have been fairly easy, that "the wars did not necessarily derive from the ethnic peculiarities of the regions; and that the wars were by no means inevitable."[790]

Mueller's comment on the policing issue are particularly relevant to the thesis and he concludes that you do not need too many police to maintain order, their control of the situation does not need to be Leviathan-like, and that any military force used to police a potential "takeover" situation needs to be organized, disciplined, with coherent tactics or strategy, deep motivation, have broad popular support, have an ideological commitment and have courage to stand up to the "opportunistic thugs" who have few if any of these characteristics.[791] Mueller offers the UN mission in Rwanda as an example where the small military element "simply forbade the murder squads entry" to Kigali Stadium and saved thousands of lives.[792]

In Bosnia, he notes that a small and effective force could have established order in places such as Višegrad (a town where sixteen well-armed local Serbs forced some 14,500 Muslims to leave which allowed the Serb residents to profit from the property

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[789] *Ibid.* at 53.
[790] *Ibid.* at 62.
[791] *Ibid.* at 64.
[792] *Ibid.* at 65.

left behind), Teslić (a group of 20 "Mice" who executed Bosniaks and Croats and after extorting money and property from them moved onto the Serb population and extorted property and raped the women of Serbs serving in the war), and in Srebrenica (a Muslim warlord, Orić, and fifteen men controlled this town of 37,000 and was absent during the 1995 massacre).[793]

What concerns Mueller is that a force of this type may never be assembled by the international community because of the "extremely low tolerance for casualties in peacekeeping ventures in which clear national interests do not appear to be at stake."[794] He cites the Spanish withdrawal from Bosnia after a loss of seventeen personnel in 1997, the Belgian withdrawal in Rwanda and the American withdrawal from Somalia after the loss of eighteen as three examples which may prevent the international community from becoming involved in situations where a quick policing reaction would prevent a destabilized situation from resulting in increasing loss of life.

It is the writer's submission that PMCs have the characteristics to ideally place them into Møller's manifest or Mueller's takeover stage. Both authors note that this would be an ideal opportunity for a small force with coercive capability to influence the situation with both short-term and long-term implications.

Professor Jarat Chopra has also studied internal conflict and suggests "the development of a concept for the limited and gradually escalating use of armed force in

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[793] *Ibid.* at 54 and Vasko Popovic and Lidija van der Haiden and Nezavisna Novine Research Team, "Reign of Terror in Teslic Started with Execution of 38 Bosniaks and Croats" Nezavisne Novine, Banja Luka, Srpska, B-H, September 15 1999 online: http://www.cdsp.neu.edu/info/students/marko/neznov/neznov2.html.

[794] Mueller, *supra* note 786 at 66.

multinational missions 'fighting for peace'."[795] His concept looks at UN military operations along a continuum with subcategories best represented in the following table:[796]

Table 4: Chopra Levels of Operations

LEVEL ONE OPERATIONS	LEVEL TWO OPERATIONS	LEVEL THREE OPERATIONS
Observer Mission	Preventive deployment[797]	Sanctions
"Traditional" Peacekeeping	Internal Conflict Resolution Measures[798]	High Intensity Operations (Articles 41/42)
	Assistance to civil authorities[799]	
	Protection of humanitarian relief organizations[800]	
	Guarantee and denial of movement[801]	

PMCs could be used during the initial stages of Level two operations thereby allowing the UN to debate and discuss more long term solutions to the issues being handled by the PMCs knowing that the principles and purposes of the UN Charter are being upheld while debate, discussion and longer-term planning is carried out.

The International Commission on Intervention and State Sovereignty (a Canadian initiated commission of international jurist, scholars and politicians) has also contributed to the discussion of criteria for military intervention. Its final report – The

[795] Jarat Chopra, *Peace Maintenance: The evolution of international political authority* (New York: Routledge, 1999) at 6.
[796] *Ibid.* at 6-7.
[797] A UN force deployed to an area where tension is rising between two parties with the objective of avoiding an outbreak of hostilities or the maturing of an existing conflict. *Ibid.*
[798] A UN force underwriting a multi-party cease-fire within a state by demobilizing factions, securing their weapons, and stabilizing the theatre. *Ibid.*
[799] The underwriting of a transition process by re-establishing a country's civil society from the ashes of conflict by providing security during repatriation of refugees, organizing and conducting elections and the early stages of infrastructure rehabilitation. *Ibid.*
[800] Establishing a corridor, mounting bases and delivery sites for distribution of humanitarian relief. *Ibid.*
[801] Secure rights of passage on land, air or water and restrict passage of parties "designated as delinquents." *Ibid.*

Responsibility to Protect - arrived at a list of six criteria for military intervention.[802]

These criteria were:

1. right authority – a consensus amongst those consulted that the UN Security Council is the authority to grant legitimacy to military intervention (or, in the alternative, the UN General Assembly via the "Uniting for Peace" resolution process);[803]
2. just cause – defined as either large scale loss of life or large scale "ethnic cleansing" both actual or apprehended;[804]
3. right intention – the intervention's primary purpose "must be to halt or avert human suffering" taken as part of a collective or multilateral action;[805]
4. last resort – all diplomatic and non-military avenues must be explored or have been considered unsuccessful if not engaged prior to military intervention;[806]
5. proportional means – "scale, duration and intensity … should be minimum necessary to secure humanitarian objective." Higher standards than the usual laws of armed conflict may apply.[807]
6. reasonable prospects – "military intervention is not justified if actual protection cannot be achieved."[808]

The Commission (ICISS) states that the objective of military intervention is to "protect populations and not to defeat or destroy an enemy militarily" as a result, it differs from traditional warfighting.[809] The ICISS also concluded that there were two categories of preventive military operations each with "distinctive characteristics."

The flaw which this writer notes in the ICISS's discussion is based upon the analysis of the law relating to intervention offered in Part 2. Their conclusion, that consent is required from the government involved prior to even preventive military

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[802] ICISS, *supra* note 475 at 32.
[803] *Ibid.* at 49-53.
[804] The text reads:
- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product of either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape. *Ibid.* at 32.

[805] *Ibid.* at 35-36.
[806] *Ibid.* at 36.
[807] *Ibid.* at 37.
[808] *Ibid.* at 37.
[809] *Ibid.* at 57.

deployment, lessens the effectiveness of their discussion of military intervention as the likelihood of consent is reduced, the further along the continuum a conflict has developed (suggested by Møller's discussion of increased personal agendas and personal profiteering). Although the ICISS's cited example of preventive deployment in Macedonia may have proven successful, it is this writer's submission that the Macedonian success is not easily transferable to many other conflict situations. If the reason for an intra-state conflict, as submitted in Part 4, is more criminal in nature than the Macedonian situation, then consent will not be forthcoming.

This is why this writer recommends an alternative.

The future within which the UN will be forced to act and react will provide a range of requirements from the more benign form of traditional peacekeeping to peace enforcement and as noted by Professor Weiss, "everything messy in between."[810]

Enforcement Mechanism War Crimes Tribunals

In reaction to the genocides in Yugoslavia and Rwanda, the United Nations established two ad hoc tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY)[811] and the International Criminal Tribunal for Rwanda (ICTR)[812]. In both resolutions establishing the tribunals, the United Nations Security Council dealt with a number of aspects of creating these tribunals except one – an effective vehicle of

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[810] Thomas G. Weiss, "UN Military Operations in the 1990s: 'Lessons' From the Recent Past and Directions for the Near Future" in Muthiah Alagappa and Takashi Inoguchi, eds., *International Security Management and the United Nations* (Tokyo: United Nations University Press, 1999) 409 at 423.

[811] Established pursuant to Security Council Resolution 827 on May 25, 1993. *Resolution 827*, UN SCOR, 1993, UN Doc. S/Res/827 (1993).

[812] Established pursuant to Security Council Resolution 955 on November 8, 1994. *Resolution 955*, UN SCOR, 1994, UN Doc S/Res/955 (1994).

arresting those charged with crimes pursuant to these two resolutions.[813] The two Tribunals were to rely upon the cooperation and assistance of states to provide this critical function to any system of justice.

This reliance upon the good will of nations has lead to mixed results.[814] Commentators have noted that Rwanda and her African neighbours have been helpful with the requirements of the ICTR and there are some 90,000 inmates awaiting trials for genocide and war crimes offences.[815] This cooperation is tentative as the Rwandan government only lifted the travel restrictions on witnesses after the Chief Prosecutor decided not to proceed with investigations of current Rwandan governmental officials. In the case of the ICTY, the support provided to this ad hoc tribunal has been minimal.

This lack of state support to apprehend indicted criminals has required the development of alternate measures.

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[813] Pursuant to Article 28 of the ICTR resolution, "[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda."

Ibid. at 14. Article 29 of the Statute establishing the ICTY reads exactly the same. U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

[814] A current example of the continued lack of cooperation which international law courts experience is the situation of Charles Taylor, the president of Liberia. On 4 June 2003, the Special Court of Sierra Leone accused Mr. Taylor of being the principal backer of the rebel group which killed and maimed thousands of civilians throughout Sierra Leone. At the time of the indictment, President Taylor was attending talks organized by the Economic Community of West African States and the International Contact Group of Liberia aimed at resolving the internal conflict then occurring in Liberia. These talks were being held in the neighbouring country of Ghana which is reported to have not only allowed Mr. Taylor to leave the country but also had provided him with a plane to return him home. Steven Edwards "Indicted leader of Liberia flees peace talks" *The National Post* (6 June 2003), A13 and Amnesty International, Press Release, "Special Court for Sierra Leone: Amnesty International calls on the government of Ghana to arrest President Charles Taylor" 4 June 2003 online: Amnesty International http://www.web.amnesty.org/web/web.nsf/print/ENGAFR510062003.

[815] Mary Margaret Penrose, "Lest We Forget: The Importance of Enforcement in International Criminal Law" (1999-2000) 15 Am. U. Int'l L. Rev. 321 at 347 [Penrose].

In the case of the ICTY, seven indirect enforcement measures have been used by the tribunal as a substitute for the lack of state assistance.[816] These seven measures, referred to as "soft" (1 through 6) and "hard" (use of military force), include:

1. the condemnation of non-cooperation;
2. offers of cash rewards;
3. luring those indicted across the border to another nation:
4. the freezing of assets:
5. economic incentives to governments;
6. diplomatic/economic sanctions; and
7. the use of military force.

On 25 July 2003, it was reported that the Chief of Investigations of the Special Court for Sierra Leone, Alan White, stated that he would not turn anybody down who would deliver Charles Taylor, the criminal who lead Liberia and had been charged with offences by that Court.[817] His suggestion included private companies.

This matter came to the world's attention as a result of a PMC (Northbridge Services Group) submitting a £3 million plan to arrest Taylor but, it was turned down.

The difficulty with using military force to arrest alleged criminals is that soldiers are not trained to do this job. The equipment they have is unsuitable and nations are loath to send soldiers who are clearly recognized as belonging to any particular nation into situations which may backfire and require an escalation of national military strength. When Western nations, in particular, are reducing their militaries with an eye towards reducing their responsibilities they are not looking for addition missions or to have the missions they are presently involved in expand via mission creep into areas for which soldiers are unsuited.

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[816] Mikas Kalinauskas, "The Use of International Military Force in arresting War Criminals: The Lessons of the International Criminal Tribunal for the Former Yugoslavia" (2002) 50 U. Kan. L. Rev. 383 at Note 10.

[817] Anton La Guardia, "Mercenaries may be key to oust Taylor" *The Telegraph* (27 July 2003) online: The Telegraph Group www.news.telegraph.co.uk.

Another critical factor as to why national militaries should not and are not being used is the possible retaliation factor. Since the Mogadishu situation where American soldiers' bodies were dragged through the streets, warlords and criminals around the world are well aware of the positive significance of retaliating against western militaries and in particular against Americans (the Americans pulled out of Somalia leaving the warlords to run the country as they liked). With a national military as a retaliation target and reaction by the military against the perpetrators leading to an escalation of a conflict above what that nation's politicians are prepared to accept either as casualties or as an escalation of the conflict. If the nation does not respond to then that nation is regarded as weak and the MacInnis's critical element of coercive force would be lost to that nation.

PART 5 – THE RELEVANCE OF THE UN AND SECRETARY-GENERAL

5.1 – Continued Relevance of the United Nations

"An institution must have the capacity to be effective."[818]

This statement by Jean Paul Biramvu, a survivor of the Rwandan genocide and secretary-general of CLADHO,[819] unfortunately reflects a common evaluation of the United Nations' effectiveness in addressing many interstate and intrastate conflicts.

In an April 2003 article in the Globe and Mail newspaper, David Malone, a former member of the Canadian delegation to the United Nations asked "whether or not the UN can actually address 'hard' security issues and if not the UN Security Council may be relegated to a forum for second order conflicts."

These are not isolated suggestions but a continuing cavalcade of commentary. Most recently, Professor Glennon concludes an article by suggesting that there is little evidence "that the Security Council will soon be resuscitated to tackle nerve-center (sic) security issues" and although the Security Council "will still on occasion prove useful for dealing with matters that do not bear directly on the upper hierarchy of world power" its current loss of credibility allows the world reality of conflict march by. [820]

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[818] African Rights, *Rwanda: Death, Despair and Defiance*, rev. ed. (London, U.K.: African Rights, August 1995) at 1115 [African Rights].

[819] CLADHO (Collectif des ligues et associations de defense des drotis de l' homme au Rwanda) was created in March 1993 when four associations united to address the numerous prevailing violations of human rights in Rwanda. CLADHO objectives include: working for the defence of human rights, to promote and stimulate the national conscience for human rights, to establish contacts with donor organizations with common objectives and interests, and to promote the creation of other organizations aimed at the defence of human rights. Online: Africa Peace Forum http://www.amaniafrika.org/history.shtml.

[820] Michael J. Glennon, "Why the Security Council Failed" (2003) 82:3 Foreign Affairs 16 at 33 [Glennon].

One important aspect of the increasing lack of relevancy was the UN's obsession with neutrality in peacekeeping operations. It is one of the three major principles of traditional peacekeeping.

In a recent article, Dominick Donald explores the differences between neutrality and impartiality and concludes that "traditional impartiality is in fact neutrality."[821] He further submits that although the confusion about the meaning of these two terms has little consequence in the hallways of political discussion, however, this confusion has devastating consequences in the field. Personnel engaged in peace operations "cannot afford confusion." They must understand whether they are joining a "neutral force (operating within limits set by the belligerents…) or an impartial one (acting independently of the parties, based on judgment of the situation)."[822]

Despite continuing comments by others, Major General Romeo Dallaire, the UN mission commander in Rwanda, has continued to support the United Nations. In a speech given at the University of Alberta in April, 2002, he spoke of his experience as a commander who was powerless to do anything despite having communicated with the UN in New York.[823] Despite the harm he witnessed and his personal harm. Dallaire restated his support to the United Nations and suggested that nations should give up "a bit of our sovereignty in order to give the UN the troops or the capability… to stop and prevent a crisis from happening." He also asked that we not render the UN less effective by setting up coalitions and suggested that although the bureaucracy of the UN

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[821] Dominick Donald, "Neutral Is Not Impartial: The Confusing Legacy of Traditional Peace Operations Thinking" (2003) 29:3 Armed Forces and Society 415 at 436.
[822] *Ibid.*
[823] Lieutenant General Romeo Dallaire, "Not Just a Colour on a Map" (Paper presented at the University of Alberta, Human Rights Lectureship, 10 April 2002) [unpublished].

needs to be purged every once in a while, we should allow the UN sufficient resources to intervene.

5.2 – The Role of the UN Secretary-General in Peacekeeping

Pursuant to Article 7 of the UN Charter, the Secretariat of the UN was created as a principal organ not a subsidiary one. As a result, it is equal to the other UN organs. Professor Gordenker points out that by virtue of this status, the Secretary-General and his staff has the "same legal standing as any member state and probably a superior status, since members act only collegially in United Nations institutions."[824]

Although the UN Secretary-General is the head of the Secretariat, his office includes more than just this organ as a result of his having both administrative and political functions.[825] This section will deal with the increasing role and powers of only the Secretary-General and not the Secretariat.

In the early 1990s, Sir Brian Urquhart suggested that there were three major challenges for the Secretary-General: first, that the UN was originally intended to be a bureaucratic and diplomatic organization but has increasingly become involved in field operations, second, that the organization was established to deal with inter-state conflict and not intra state conflict, and third, the global problems of poverty and sustainable development remain a challenge to all international organizations especially in times of crisis management and re-organization.[826] These challenges can be used by the

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[824] Leon Gordenker, *The UN Secretary-General and The Maintenance of Peace* (New York: Columbia University Press, 1967) at 64 [Gordenker].
[825] Simma-Charter, *supra* note 304 at 1021.
[826] Sir Brian Urquhart, "Foreword" in Benjamin Rivlin and Leon Gordenker, eds., *The Challenging Role of the UN Secretary-General: Making "The Most Impossible Job in the World" Possible* (Westport, Conn.: Praeger Publishers, 1993) vii at viii.

Secretary-General to continue the trend of the development and increasing interpretation of his role within the UN.

To be able to assess the capability of the Secretary-General in outsourcing peacekeeping operations to the extent suggested by the thesis we will examine several aspects of his capacities including the legal basis of his powers and his involvement in the peace and security function often delegated to him by the UN Security Council.

5.3 – Legal Basis for the Powers of the Secretary-General

Chapter XV of the UN Charter sets out the apparent authority of the Secretary-General and the Secretariat. There are several Articles which are particularly relevant to the thesis including Articles 97 through to 101.

Article 97 defines the Secretariat as consisting of a Secretary-General and "such staff as the Organization may require." By virtue of Article 99, the Secretary-General may bring a matter threatening the maintenance of international peace and security to the attention of the UN Security Council. Article 100 admonishes the Secretary-General and UN staff not to seek instructions from any government or authority external to the UN while Article 101 indicates that the paramount consideration in the employment of staff and in the determination of the conditions of service in the Secretariat shall be securing the "highest standards of efficiency, competence and integrity." (Reference to Article 98 is made later.)

Article 99

Understanding Article 99 of the UN Charter is fundamental to appreciating the increasing number of roles which the UN Secretaries-General have accepted or initiated over time.

Article 99 reads:

> The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of peace and security.

Dr. Bourdeau notes that this Article "is the constitutional source of significant preventive and discretionary powers for the Secretary-General" and that it "provides an individual with the discretionary and preventive powers to analyze and – if need be – actively intervene in an incipient conflict involving nation-states or, even, ethnic representatives."[827] The second element is particularly important in developing the thesis, as Boudreau's conclusion suggests that not only can the Secretary-General become involved in inter-state conflict, but also intra-state conflict.

Boudreau also suggests that pursuant to this article, the Secretary-General need not only act in a preventive capacity, but can also take steps to maintain communications between warring parties.[828]

Further study of this article points to the expansive ambiguity of this power provides the Secretary-General a powerful tool.

The Secretary-General must first decide if the matter which is intended to be brought to the Security Council threatens international peace and security. Although the Security Council does not have the exclusive responsibility for the maintenance of international peace and security,[829] pursuant to the wording of this specific article the Security Council is the destination of the Secretary-General's attention.

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[827] Thomas E. Boudreau, *Sheathing the Sword: The U.N. Secretary-General and the Prevention of International Conflict* (New York: Greenwood Press, 1991) at 9.

[828] *Ibid.*

[829] As noted by the International Court of Justice in the *Nicaragua* v. *United States of America* case when it considered Article 24 of the UN Charter and noted that pursuant to that article the Security Council has only the primary responsibility for the maintenance of international peace and security. Louis B. Sohn,

Boudreau also considers the meaning of three interesting elements of this article.

The first element is centred upon the meaning of the article's first use of the word "may". There is no obligation upon the Secretary-General to bring matters to the attention of the Security Council.[830] By inserting the words "in his opinion", the Charter drafters left it entirely up to the Secretary-General to use his judgment whether or not to bring a matter forward. Professor Boudreau also looks to the French text of this article and concludes "that there is nothing casual about the Secretary-General's discretionary responsibilities and powers under this Article."[831] This is not a passive discretionary power.

In reviewing the use of the second "may" in Article 99, Boudreau concludes that this usage emphasizes "the uncertainty of events that may threaten international peace and security" and that there is a further conditioning of the word "may" by the inclusion of the term "any matter."[832] The use of "any matter" (as opposed to the more commonly used Charter phrase "any dispute or situation") also "provides a more liberal – and not limited – scope" to the powers of the Secretary-General.[833] Boudreau concludes that the Secretary-General does not need indisputable evidence that the matter threatens the "maintenance of international peace and security" to exercise his discretion, but he may "simply believe or suspect or fear" that something threatens it.

"Any matter" includes a unquestionable range of activities and are not limited to military or political developments which may be referred to the Security Council.

"Interpreting the Law" in Oscar Schachter and Christopher C. Joyner eds., *United Nations Legal Order* vol. 1 (Cambridge, U.K.: Cambridge University Press, 1995) 169 at 182 [Sohn].

[830] Kelsen-United Nations, *supra* note 368 at 303.

[831] Boudreau, *supra* note 827 at 11.

[832] *Ibid.* at 11.

[833] *Ibid.* at 11.

The result is that the Secretary-General "must provide a strategic vision of the future" and be peace and security's spokesperson on the international stage.[834] He must play a preventive role by anticipating issues and events and provide warnings as to the dangers he feels fall within the meaning of this Article.

The preventive element is as a result of the article's use of the word "maintenance" and its implication on the preservation of international peace and security.[835] Boudreau is also of the opinion that the Secretary-General was not given "any rights or responsibilities to take steps to enforce international peace and security" as this is the explicit role of the Security Council when it initiates actions pursuant to Chapter VII and provides the Secretary-General direction in accordance with Article 98.

Boudreau also notes that the doctrine of implied powers is also applicable to the Secretary-General which manifests itself in the Secretary-General being able to "conduct independent investigations and to gather information."[836] Boudreau adds that this information gathering and investigation must be consistent with the UN Charter and he cites the seeming limitations imposed by Article 2(7) as one of the guiding principles. As noted in Part II of this thesis, there is an argument which has been made that, currently, Article 2(7) has few limitations.

Even with this limitation, Professor Boudreau further advocates that there is a proper legal test to be applied to the actions of the Secretary-General – that of effectiveness and functionality, otherwise the holder of this office "is not fulfilling his obligation under the Charter to maintain international peace."[837]

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[834] *Ibid.* at 11.
[835] *Ibid.* at 12.
[836] *Ibid.* at 14.
[837] *Ibid.* 14-15.

Boudreau also disputes the position of some who have argued that the Security Council is the only organ which has a role to play in the maintenance of peace and security at the UN. Although acknowledging that the Security Council has the exclusive role in the restoration or peace and security through enforcement action, to "overgeneralize … and claim exclusive jurisdiction…" ignores Article 99 which gives the Secretary-General a vital role with respect to "an issue of potentially vital importance to the preservation of peace."[838]

In setting out the form of the preventive role of the Secretary-General, Boudreau notes that this is a three stage process. The first stage is when a conflict is identified through the UN's early warning system which, at the time of Boudreau's analysis, included informal discussions with diplomats and the receipt of information from senior staff. The second stage involves direct talks with the participants in the conflict whose "primary purpose … is to keep Secretariat officials, especially the Secretary-General, better informed about potential conflict situations."[839]

The use of the Secretary-General's good offices is the third level of analysis and intervention and Dr. Boudreau notes Pechota's UNITAR study of these good offices. Pechota writes that there are two types of good offices – those undertaken after a request by an organ of the UN and those the Secretary-General decides to initiate. Although the primary purpose of the use of good offices is to "serve the parties directly involved in a brewing dispute" they also serve to provide the Secretary-General with relevant information.[840]

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[838] *Ibid.* 19.
[839] *Ibid.* at 140-141.
[840] *Ibid.* at 141.

Particularly relevant to the thesis is the UN framework for international negotiations (UNFIN) which serves to "intensify the search for all relevant information and possible solutions, especially when the danger of war seems to be growing."[841]

Boudreau sets out the following steps to the procedure of UNFIN:

1. dispatch of negotiators headed by an Under-Secretary;
2. creation of alternative channels of communications between the various parties;
3. develop proposal to end the conflict through the use of diplomatic members of the parties in conflict;
4. introduction of these proposals into bilateral negotiations of the parties; and
5. UN commitment to assist in the implementation of any agreement between the adversaries.[842]

The purpose of this process is to look for "relevant information and possible solutions by mobilizing not only the diplomatic community, but also "all possible political and technical support in order to avoid war."[843]

It is at this point, the introduction of "technical support in order to avoid war" that this writer submits that private military companies are able to provide technical expertise quickly and effectively as part of the UNFIN process.

As noted earlier, the Secretary-General has both administrative and political functions. Amongst his political functions, the Secretary-General is *in loco regis* when he performs ceremonial functions but as noted by Professor Thomas Franck, his primary function is that "he has become the UN's 'good officer' performing the mediating and diplomatic functions necessary to resolve conflicts."[844] In reviewing this "good officer" role, Franck concludes that "it is the Secretary-General who has taken

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[841] *Ibid.* at 143.
[842] *Ibid.* at 144.
[843] *Ibid.* at 145.
[844] Thomas M. Franck, "The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture" (1995) 6:3 E.J.I.L. 360 at 360 [Franck - SG].

most of the initiatives to prevent or end the armed conflicts which threaten peace between and within nations."[845]

From Professor Franck's detailed review of the evolution of this good office role for the Secretary-General, of significance for the thesis, is the depth and the breadth of the evolution of this position.

There are no provisions in the UN Charter allowing the Secretary-General to establish or use his good offices to resolve conflicts around the world. This is a role which has developed in practice and as Professor Franck notes, is one of the most important functions of the UN. [846]

Some reviews of the work of the various Secretaries-General indicates that each Secretary-General formed "his own concept of the office and its scope and functions."[847]

Franck summarizes his discussion on this topic noting that in legal terms, the Secretary-General's peacemaking powers derive from four different kinds of authorization:

1. agreement between parties (i.e. *Rainbow Warrior* case and Liberian and Yugoslav crises);
2. the "penumbra" or blending of the Secretary-General's inherent powers (i.e. civil wars in Greece, Yemen, Afghanistan, Burundi, Rwanda, Tajikistan);
3. Security Council authorizations (i.e. Cyprus, Namibia, Somalia, Yugoslavia); or
4. General Assembly authorization (Afghanistan and the Western Sahara).[848]

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[845] *Ibid.*
[846] *Ibid.* at 361.
[847] Gordenker, *supra* note 824 at 64.
[848] Franck-SG, *supra* note 844 at 381.

In a number of these situations it appeared that the incumbent Secretary-General applied the principle of "its better to ask for forgiveness than to ask for approval", especially if the initiative has worked to everyone's advantage. This principle would have applied to the situations indicated as examples of number four above as well as in the situations in Cambodia, the Falkland Islands, Iran/Iraq, Burundi and Somalia where the Secretary-General had already become "active on his own just before the political organs, usually at his suggestion, gave his efforts formal approval."[849]

To have been able to act in the ways they did, the various Secretaries-General needed to have the confidence of the Security Council, General Assembly, the major nations and regional groupings. Professor Franck adds that "in contemporary practice, the Secretary-General frequently insists upon, and gets, the authority to operate within a wide margin of discretion."

It is a submission of this thesis that Kofi Annan, who served as the Under-Secretary-General for Peacekeeping (prior to his selection as Secretary-General) was selected as someone who had already initiated a number of reforms in the Department of Peacekeeping Operations (DPKO) making it more effective and efficient. Additional reforms in this area would be expected by Member States including the outsourcing of peacemaking or peace enforcement functions.

In Franck's mid-1990s article, he foreshadows the continuation of the Cold-War period stasis which could allow the role of the Secretary-General to expand and respond to changing institutional and political needs and pressures. This would be an extension of the situation of the Cold-War era which provided ample ground for the role of the

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[849] *Ibid.*

Secretary-General to develop to fill the needs of the day. He accounts for this situation to continue as a result of a number of factors including the principal threat to peace being as a result of internal strife and the "growing unrest on the part of States at the cost of burgeoning UN field operations."[850]

Franck concludes his thoughts on the subject of the powers of this position by suggesting to further develop the role of Secretary-General by providing him:

1. with a trust fund "sufficient enough to embark on credible mediating missions at his own initiative" to a maximum of six months after which time Security Council approval and additional General Assembly funding would be required;
2. a small multinational force under his command which would be deployable for a maximum of six months which mandate would be renewable by the Security Council (presumably the initial mandate would be developed by the Secretary-General);
3. with the resources to put together larger military or civilian operations within short time frames by drawing upon prearranged inventories as provided by member states; and
4. an ability to exercise "his influence on the treasuries of Member States at the time they earmark their contributions to [quasi-autonomous subsidiaries (QSA) and intergovernmental organizations (IGOs)]."[851]

After reviewing the evolution of the roles and powers of the Secretary-General, Professor Rivlin drew similar conclusions and noted that "[i]f structure were all that counted, the person holding the office would be of no consequence, since he or she is hemmed in by the existing rigidities and limitations established by the world of sovereign states. But formal structure is only a façade. Beneath it, a whole array of informal understanding, arrangements and procedures exists that enable the Secretary-General to make a difference."[852]

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[850] *Ibid.* at 383.
[851] *Ibid.* at 387.
[852] Benjamin Rivlin. "The Changing International Political Climate and the Secretary-General" in in Benjamin Rivlin and Leon Gordenker, eds., *The Challenging Role of the UN Secretary-General: Making*

Critical to the Secretary-General's ability to interpret his role is that both the Secretary-General and the Secretariat "are assigned autochthonous progenitive powers."[853]

Interpretation of UN Charter

The process of interpreting what is meant by the words and phrases of the UN Charter is left up to each organ to interpret those parts of the Charter as are applicable to its functions.[854] If two organs of the UN have different interpretations of any provision of the UN Charter they may then refer the matter to the International Court of Justice, establish an *ad hoc* committee of jurists to provide their views, hold a joint conference to "devise a compromise solution" or amend the UN Charter thereby establishing "a formally binding authoritative interpretation."[855]

Professor Sohn notes that although the UN Charter "is almost immunable as far as its text is concerned, but over less than fifty years its interpretation changed as much" as the American Constitution has over two hundred years.[856] He concludes that even with respect to such an important issue as intervention pursuant to Article 2(7), any initial barriers to intervention were at first slowly eroded "until it eventually crumbled."[857] Prof. Sohn adds that this interpretative process is not unusual, but "actually parallels the developments in domestic legal systems where certain constitutional restrictions have been reinterpreted constantly in practice."[858]

"The Most Impossible Job in the World" Possible (Westport, Conn.: Praeger Publishers, 1993) 3 at 17 [Rivlin].

[853] Franck, *supra* note 343 at 25.

[854] Sohn, *supra* note 829 at 173.

[855] *Ibid.* 173-174.

[856] *Ibid.* 227.

[857] *Ibid.* 228.

[858] *Ibid.*

A telling reminder of how any article of the UN Charter should be interpreted was set out in the *Reparations* case.[859] In this case, the International Court of Justice was asked to provide an advisory opinion with respect to the right of the UN to bring claims for injuries suffered by its staff in the service of the UN, and offered that the "United Nations rights and duties are limited to those related to 'its purposes and functions as specified or implied in its constitutional documents and developed in practice.'"[860]

Peacekeeping and the Secretary-General

Responsibilities relating to peacekeeping fall under the Article 98 category of "other functions" and as noted by Gordenker, "these duties [related to peacekeeping] have required the use of every means of influence in his [Secretary-General's] command."[861]

The Secretary-General may influence the development of a peacekeeping mission in a number of ways.

One of the most critical points of influence may be in the development of a mandate. The body setting the mandate relies upon the information provided to it by the Secretary-General and can "be influenced through the quality and objectivity of the Secretary-General's reports."[862]

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[859] Advisory opinion relating to Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep. 174.
[860] Sohn, *supra* note 829 at 189.
[861] Gordenker, *supra* note 824 at 235.
[862] The Honourable Philippe Kirsch, Q.C., " Reflections on the Role of Secretaries-General in United Nations Peacekeeping" in John Norton Moore and Alex Morrison, eds., *Strengthening the United Nations and Enhancing War Prevention* (Durham, N.C.: Caroline Academic Press, 2000) 3 at 4 [Kirsch].

Kirsch also suggests that there are a range of other matters which influence peacekeeping missions, but indicates that the most important consideration is the personal capacities of the individual occupying the Secretary-General's chair.

Legal Basis of Peacekeeping

After considering a number of theories as to the legal basis for peacekeeping, Kirsch concludes that in the end, "this question is likely now of marginal relevance in practice: peacekeeping operations exist within the United Nations system.[863]" He submits that peacekeeping is completed in furtherance of the UN principal purpose of peace and security and that the UN has the broad powers to accomplish this purpose and principle in the Charter.

He suggests that there are some advantages to having the legal basis obscure, in the same way that peacekeeping's manner of conduct and the powers of the various actors remain obscure.

Kirsch adds that there are two legal sources for the Secretary-General's authority in matters of international peace and security and peacekeeping operations. These powers are his inherent powers derived from Article 99 of the UN Charter and the powers delegated to him by the Security Council and in exceptional situations, the General Assembly.[864]

With respect to his inherent powers, the Secretary-General does not need to await authorization from either of the other two organs of the UN to exercise the functions which are inherently his to use. An example of this is the Secretary-General's use of the powers of his "good office". Although he has the power of bringing threats

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[863] *Ibid.* at 10-11.
[864] *Ibid.* at 13.

to peace and security to the attention of the Security Council (Article 99) this authority "does not extend to the creation of peacekeeping operations in the absence of a mandate."[865] The other, more practical limitation is that the Secretary-General has only a small discretionary budget and without a mandate the necessary funds would not be forthcoming to pay for a peacekeeping operation.

Despite this comment, Kirsch finds that the gulf between the "good offices" and the requirement of securing a mandate is wide and that pursuant to Article 98, the General Assembly or Security Council may mandate the Secretary-General and the Secretariat "to perform functions they deem necessary."[866]

As with the subsequent example of the resolutions leading to the creation of UNEF in 1956, "much remains unsaid in these resolutions and the operations of the Secretariat follow patterns set through successive previous operations."[867]

Another critical element to the development of the thesis, is the point raised by Professor Rivlin when he agrees that Article 99 provides the Secretary-General with only limited autonomy and yet, "[o]n the other hand, the Charter does not endow him with any specific authority as third-party mediator, conciliator, negotiator or extender of good offices. Yet, these roles have become identified as established but not exclusive properties of the office of Secretary-General."[868]

In the same way it could be submitted that nothing limits the Secretary-General from subcontracting peacekeeping operational functions.

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[865] *Ibid.*
[866] *Ibid.* at 14.
[867] *Ibid.*
[868] Rivlin, *supra* note 852 at 10.

There are a number of examples of the Secretary-General saying he is not entitled to take a particular action and doing exactly the same. Rivlin offers an example of this when in 1958 and the Soviet complaint about the over-flight of US nuclear armed bombers when Hammarskjöld first admitted that he cannot assume for himself any kind of right to speak for man, but went ahead and did so contending that he "must subordinate himself to his duty to express the significance of the aspirations of man, as set down in the Charter."[869]

5.4 – How the vehicle of PMCs could be put into place

The political and military consequences of a new peacekeeping process would be cause for concern amongst most if not all delegates of member states. More correctly stated, the optics of nations supporting an effective and cost efficient means of peacekeeping when they have decried mercenaries for decades, may not play well on the television screens at home.

As a result, we now turn to how this position could be advanced by first considering the circumstances of the putting in place of an even more monumental UN involvement in a conflict – the first peacekeeping force mission, UNEF.

The foundation of the Secretary-General's initiation and involvement in peacekeeping began with Hammarskjöld's interpretation of Article 99[870] and his "increasingly broad conception of the office."[871]

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[869] *Ibid.* at 11. Two other examples are also offered by Rivlin focusing on Perez de Cuellar's plan for deployment of UN peacekeeping forces in Yugoslavia and the work of his personal assistant in freeing the American and British hostages in Lebanon.

[870] Article 99 reads:

> The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

[871] Gordenker, *supra* note 824 at 238.

Prior to the suggestion being put forward by Mike Pearson (that the Secretary-General be authorized to put together a UN force to hold the line while a political settlement had an opportunity to develop) the Secretary-General was very much involved in the background researching the policies which he would later enforce. On 3 November 1956 Pearson put forward a proposal which was not the entire scheme of how the Secretary-General was to hold the line, but simply the he was to develop a plan for a force.[872] This gave Hammarskjöld sufficiently broad terms within which to develop a force which would be politically acceptable and almost a *fait accompli* in the circumstances. The resolution which was presented on this first peacekeeping force simply established a UN command for an emergency force and placed a general, who was commanding a nearby UN mission, in charge. The Secretary-General "was invited 'to take such administrative measures as may be necessary for the prompt execution of the actions envisaged.'"[873] As a result, the organization of the force and its mission was left up to the Secretary-General. When he gave his second report on the development of the UNEF, Hammarskjöld avoided reference to any details of the size, organization and recruitment of the force thereby keeping those matters within his own jurisdiction.[874]

Gordenker summarized Hammarskjöld's actions by concluding that the UNEF "authorization resulted as much as anything else from the persuasiveness of ideas formulated by the Secretary-General." He concurred with other remarks which indicated that the General Assembly delegated a remarkable degree of power to the Secretary-General resulting in the Secretary-General being not only the architect of the

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[872] *Ibid.* at 240.
[873] *Ibid.* at 241.
[874] *Ibid.* at 243.

UNEF but its chief administrative and executive officers as well.[875] Kirsch also adds to this discussion by submitting that the developments surrounding the establishment of the UNEF "took place outside the framework of the Charter, which had envisaged a very different approach to the peace."[876]

A few years later, reacting to the situation in the Congo, Hammarskjöld took a leadership role in developing the mandate and by using his powers pursuant to Article 99 and the UNEF experience to ultimately begin the assembling of a force and planning the deployment prior to his receiving instructions from the Security Council to proceed.[877]

The Secretary-General has already exercised his ability to establish a force directly subordinate to him and with personnel not from any troop contingent loaned to the UN.[878]

In April 1991, the UN and Iraq signed a Memorandum of Understanding (MOU) to deal with the issue of humanitarian aid. In an Annex to this MOU confirming an agreement reached 25 May 1991, Iraq allowed the deployment of a UN Guard Contingent.[879]

The Guard Contingent had the following characteristics:

1. strength not to exceed 500 Guards;
2. the number assigned to anyone region would not exceed 150;
3. they would move freely between humanitarian reception points, relation stations and sub-offices;
4. they could carry Iraqi issued side-arms; and

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[875] *Ibid.* at 244.
[876] Krisch, *supra* note 862 at 8.
[877] Gordenker, *supra* note 824 at 244.
[878] John G. Heidenrich, *How to Prevent Genocide: A Guide for Policymakers, Scholars, and the Concerned Citizen* (Westport, Conn.: Praeger Publishers, 2001) at 233 [Heidenrich].
[879] United Nations, *Yearbook of the United Naitons 1991* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1992) at 206.

5. the initial deployment of 50-60 Guards would be in the Dohuk/Zakho area.[880]

The force was drawn from a variety of sources including UN security guards but had evolved during the 1990s and into the twenty first century with various nations providing the personnel.

These guard units were initially deployed into northern Iraq after the 1991 Gulf War to "symbolically guard and help monitor the new Iraqi-Kurdish safe zone.[881] They were later deployed into the Basra area to "reassure Shi'ites of the south that the Iraq's new Big Brother, the UN is watching."[882]

Unlike conventional UN peacekeeping missions the guards wear a blue uniform, not the military uniform of the home country, the budget had been some $4 million per year (not from the regular peacekeeping budget) and the unit has been small in size varying from 500 personnel from 12 countries to 89 from eight countries in 2000.[883]

A number of positive attributes have been identified with the UN Guards including:

1. being a bilateral agreement they are insulated from P-5 politics;
2. increased flexibility as no restricted mandate is given ("to advise the UN on all issues of security" in the deployed area);
3. national sovereignty and the UN system is upheld;
4. relevant in low-threat scenarios; and
5. no large scale logistic or administrative arrangement required due to size.[884]

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[880] *Ibid.*
[881] Heidenrich, *supra* note 878 at 233.
[882] Kathy Evans, "Beaten Basra knows little and cares less about UN guards" *The Guardian* (27 July 1991) online The Guardian www.guardian.co.uk/Print/0,3858,4633281,00.html [Evans].
[883] Surya Gangadharan, "A blue berets profile: UN Guards in northern Iraq" (2000) No. 005 Issue September 16 Strategic Affairs Internet Magazine online: Strategic Affairs www.stratmag.com/issueSept-15/page05.htm.
[884] *Ibid.*

In reviewing the records of the UN we note Security Council Resolution number 688 condemned the repression against the Kurds and called upon the Secretary-General to "pursue humanitarian efforts in Iraq and report forthwith on the plight of the Kurds and to "use all the resources at his disposal…to address urgently the critical needs of the refugees and displaced Iraqi population." Nothing authorizes the UN Guard Contingent.

Financing

Although the issue of financing is critical to the integration of PMCs into the UN preventive and peace building processes, a detailed review of this issue is beyond the scope of this thesis. Nevertheless, a few comments will be made on this subject.

The Canadian rapid reaction study noted that "it would be difficult to overemphasize the degree to which inadequate, inefficient and constraining financing systems and procedure contribute to the problems of the UN."[885] The report identified that the "basic issue in the UN is the difference between spending authority and the availability of money" and as a result, "the UN cannot sign agreements incurring financial costs if the UN does not hold cash in hand."[886]

The Canadian report goes on to describe a number of factors which limit the Secretary-General's ability to contract for services (as suggested by the thesis) as his standing authority to spend on matters of peace and security, is limited to US$3 million annually. To provide for the approximate US$50 million within which limits a PMC operation could require, the Secretary-General would need to consider the following:

1. secure Security Council approval of a mission;

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[885] Canada-RRF, *supra* note 472 at 32.
[886] *Ibid.*

2. Secretary-General has financial authority to spend up to US$10 million per mission, pending General Assembly budgetary approval; and
3. Secretary-General may seek Advisory Committee on Administrative and Budgetary Questions (ACABQ) approval to commit up to US$50 million.[887]

Once armed with this spending authority, the Secretary-General may access several avenues to borrow funds (for the typical UN peacekeeping mission) from within the UN including accessing the Peacekeeping Reserve Fund with an approval authorized availability level of US$150 million.[888]

The issues surrounding the funding of peacekeeping missions continue today. In a 15 March 2003 Secretary-General's report with respect to the financial position of closed peacekeeping missions it was restated that some US$1.5 billion remained unpaid to 10 closed peacekeeping mission files with the states which had participated in those missions continuing to bear the brunt of the lack of funding.

This writer offers two suggestions which bear on the financing of outsourcing of contracts for preventive measures. These suggestions include consideration of the implications of a financing arrangement similar to the UN's Iraq Oil-for-Food program and the logic of the argument which would be made by the Secretary-General to the primary funding nations of UN peacekeeping and/or peace building missions of not only the cost-savings offered by contracting out certain preventive measures as compared to the funding of UN peacekeeping missions (US$60 million versus US$699 million – Sierra Leone) but that the saving incurred by ensuring a capable coercive force is in the potential conflict situation not only would assist short-term and long-term stabilization efforts, but also provide and opportunity and funds for nations and the UN

[887] *Ibid.*
[888] *Ibid.* at 33.

to assist in the development of other conflict resolution processes for that particular nation. By also stabilizing a country early in the continuum of conflict, it protects the nationals of other nations living and working in the country which is the subject of preventive measures.

Both these measure bear further development outside the terms of this work.

CONCLUSION

The writer's position is that there is a place for the use of Private Military Companies along the continuum of intra-state conflicts.

Those who insist on equating today's PMCs with the mercenary adventurers of the 1960s and 1970s or to those of 14th century Italy must note that mercenaries of bygone eras were a product of their times. As noted by Prof. Taulbee, in section 4.1, today's organizations provide a range of services and that the "extent of the order established can be little better than that desired" by the contracting government.

The conclusions drawn by Musah and Fayemi are an example of the outdated thinking on this topic.[889] Throughout their concluding chapter, they show their prejudice against the use of PMCs by first using the term mercenary and, more importantly, by their use of several arguments (including human rights abuses, links to crime and illegal arms transfers, the shielding of African leaders, and entrenchment of irresponsible governance[890]) which this thesis has used equally if not more effectively against African states, militaries, and regional and sub-regional organizations. One particularly interesting remark, which emphasizes Musah's and Fayemi's prejudices, is their suggestion that the reason for African states "consistently contribut[ing] troops to multilateral peacekeeping efforts" is because "ripples of internal crises are global" and that this is a contribution to help and address that situation.[891]

Throughout Part 4, evidence has been provided that this seemingly altruistic veneer is translucently thin when held up to the light of the facts. It is this writer's

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[889] See *supra* note 6.
[890] *Ibid.* at 262.
[891] *Ibid.* at 261.

submission that western tax dollars, contributed towards peacekeeping missions, are used to fund various militaries around the world (from many nations with poor human rights records), that military intervention, by some nations, has more to do with internal problems and wanting "international legitimacy" for discredited regimes than altruism, and, most troubling, increasing evidence that conflict and military intervention is being used to add to the personal treasuries of various leaders of developing nations. Writers who are opposed to the PMCs have much to contribute to this debate, but they need to return to the 2000s and leave the catchphrases of the 1960s behind.

International Alert's study, *Humanitarian Action and Private Security Companies*, concluded that "with the end of the Cold War, the pattern of mercenary behaviour has shifted and the word, in its old sense, has become almost meaningless" and that "many new organisations of this nature have come forward with no direct links with the mercenary past." Although there remain accountability issues with respect to the use of PMCs, there remain as many accountability issues with the use of militaries from developing nations.

Part 2 reviews the current legal issues touching obligation, intervention and mercenaries and draws several conclusions. The importance of initiating a review of the development of legal obligations and the meaning of "matters essentially within domestic jurisdiction" is that "no civil war today is every wholly internal."[892] Dr. King notes issues such as concern over "widespread human-rights abuses," the potential of the warfare spreading to neighbours and "the international economic effects of large-

[892] Charles King, *Ending Civil Wars* (Oxford: Oxford University Press Ltd., 1997) at 17.

scale internal violence" leading international actors to take a "serious interest in the evolution and outcome of ongoing and latent conflicts."[893]

Arguably, all states have obligations towards the citizens of other states, including the obligation of intervention to return a state's citizens to John Austin's common weal. The discussion with respect to matters essentially of domestic jurisdiction is important in that it emphasizes that in today's interconnected global society few matters remain essentially domestic. The writer's analysis of this phrase from Article 2(7) of the UN Charter is with the view to introducing two elements into the discussion on humanitarian intervention.

The first is to suggest that if a matter is no longer essentially within domestic jurisdiction then the international community is no longer intervening, but 'attending' to a matter of international jurisdiction. The second important element of the Article 2(7) conclusions is the reduction of the UN Secretary-General's reliance upon the Security Council to provide him with direction pursuant to the UN Charter and eliminate the lengthy period of time it has taken the UN to respond to its responsibilities of international peace and security. The Security Council has the primary, but not exclusive role in international peace and security.

Even after the end of the Cold War, the Security Council remains a vehicle of lengthy debate and protracted decision-making. There is universal acceptance of the conclusion that it takes too long for the UN to react to a developing conflict situation by the use of current processes and capabilities. Three types of military intervention vehicles have been reviewed and all have shortcomings with respect to meeting the

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[893] *Ibid.*

requirement of a rapid reaction force with coercive capacity. These requirements have been discussed in reports from Canada and the Netherlands.

In reviewing the continuum of conflict, authors note that there are limited opportunities for preventing conflict. It is the writer's submission that PMCs can effectively be used (minding their limitations) during Møller's manifest phase and in Mueller's takeover stage. PMCs will not replace UN peacekeeping forces and other resources suggested by Chopra, but by being introduced into the conflict continuum early and with coercive capacity, PMCs will serve society well. By introducing this capacity quickly and early the UN will fundamentally address a major shortcoming of current conflict resolution processes. The longer processes suggested in the ICISS report will not serve the citizens of a risky state which is about to fall into anarchy. Except for a few national militaries, the ICISS intervention process will break down due to the lack of trained personnel and available equipment which nations, to date, have not allowed the UN to establish.

The issue of ethics and the moral inferiority in the use of PMCs is reviewed in Part 4 and many of the positions taken by opponents of PMCs are found wanting or are found to be characteristic of national militaries. The motives of many nations that have provided the majority of soldiers to UN missions since the early 1990s are also found questionable if not criminal. Evidence of the use of national militaries by national elites to destabilize a neighbour and contribute to the national or personal coffers of the intervening states and officials is too rampant to ignore. To ignore this behaviour by continuing to use national forces which have proven to be ethically and morally wanting negatively reflects on the legitimacy of the UN.

In reviewing the structure of the UN the writer has drawn several conclusions.

The UN "was designed to prevent,…[and] to help resolve armed conflict *between states* (sic)."[894] The UN Charter does not specifically set out what the Secretary-General can and cannot do as part of their Chapter XV responsibilities and, as a result, the role of the Secretary General has changed depending upon their personality, the working relationship they have with member states (more particularly the P-5 and members of the Security Council) and the era during which they were elected. As noted by Prof. Franck, the Secretary General has been "assigned autochthonous progenitive powers" – the ability to interpret his role.

Many countries and the UN recognize the need for new and innovative ways of attending to international peace and security. For more than ten years, discussion has been particularly focused on the need for a rapid reaction force which could be employed by the UN to first reinstate its relevancy in conflict prevention, but more importantly provide a vehicle to ensure that the innocents are not sacrificed at the altar of international debate.

Since the early 1990s, a number of solutions have been suggested, tried and found wanting. It is now time for the UN's Secretary General to take a bold step forward. It is time to set aside old prejudices. It is time to introduce into the continuum of conflict a new initiative with the coercive capacity and resolve to prevent conflict in an efficient and effective manner. As recently stated by Kofi Annan "[t]he challenge is

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[894] Holsti, *supra* note 432 at 188.

[to ensure] … that prevention exists not just at the rhetorical level but also practically."[895]

[895] Annan, *supra* note 423 at 1.

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APPENDIX A – PMCS BY COUNTRY, CLIENTS AND SERVICE

Country	PMC	Client(s)	Services*									
			1	2	3	4	5	6	7	8	9	
Angola	Mamboji Lda	De-mining operations in Angola	+							+		
	Alpha 5											
Australia	International Port Services Training Group, Ltd.	?										
Canada	ATCO Frontec Corporation	Government of Canada									+	
	Globe Risk Holdings, Inc.	Globe Risk has provided security support to operations in Sierra Leone, Sudan, Democratic Republic of the Congo, Saudi Arabia, Ecuador, Brazil, Colombia, Mexico, Russia, Central Europe and Canada.			+	+	+			+		
	Global Impact	Police and military				+				+		
France	Euro Risques International Consultants SA	Petrochemical companies in Algeria					+					
	Compagnie Internationale d'Assistance Specialisee	Contracts in former French colonies in North Africa				+	+					
	Secrets	President of Cameroons	+									
	Service and Security	Government of Togo	+			+			+	+		
Israel	Levdan, Ltd.	President Lissouba of Congo-Brazzaville and President Santos of Angola.	+	+		+						
	Silver Shadow Advanced Security Systems	Africa and Latin America	+	+								
	Strategic Consulting Group	Defunct 1998	+				+					
Netherlands	Satellite Protection Services	Defunct 2000	+	+	+	+						
Netherlands Antilles	International Defence and Security Resources NV	Government of Angola (diamond mining concessions)			+	+	+	+				
Russia	Russian Military Brotherhood	President of Congo and diamond merchants				+	+			+		
South Africa	Bridge Resources International	Companies in Angola					+					
	Corporate Trading International.	Companies in Angola					+					
	Executive Outcomes	Defunct 1999										
	Lifeguard Management	Branch Energy (Sierra Leone)					+					
	Longreach (Pty) Ltd.	MilIntel to Government of Seychelles, Companies in Angola. Defunct – 19?.					+		+			
	Military Technical Services	Botswana Defence Force's parachute unit				+						
	Nicholas Frederick and Duncan, Ltd	Sudan government,					+					
	Omega Support Ltd.	UNITA rebels, Kabila Congo Army		+	+							
	Panasec Corporate Dynamics	Companies in Angola					+					
	Saracen International, Ltd.	UN (Bosnia), Angola, Tanzania, Uganda, Mozambique, Morocco and Rwanda				+		+				
	Stability Control Agencies	Defunct 1996										
United Kingdom	Global Development Four Ltd.	NGOs in Africa and Europe and Kosovo police									+	

	Defence Systems Limited – ArmorGroup	Thirty-eight countries – Canada, Japan, Sweden, U.K., U.S.A. and Switzerland, United Nations, European Commission, Angola, Chevron, DFID, British Petroleum, World Bank, ICHO, USAID, DFID, ICRC, CARE, International Rescue Committee, Caritas, UNICEF.	+	+	+	+	+	+	+	+	+	+
	Northbridge Services Group Ltd.	Governments and corporations	+		+	+	+		+	+		
	Strategic Consulting International	Goverments of Sri Lanka, Nepal			+	+			+	+		
	Saladin Security Ltd	North Africa, South Asia, Middle East	+		+	+				+		
	Trident Marine	Asia, West Africa, Middle East and South America	+		+	+	+		+	+	+	
	TASK International Ltd.	UN approved contractor. Government and corporate clients in Asia, Africa, Caribbean, Middle East and Europe	+			+				+		
	THULE Global Security International	Offices in Belgium, U.S. and Asia.	+		+	+	+		+	+	+	
	Watchguard International Ltd.	Palace Guards in Middle East and government in Asia, Africa, and Latin America. Defunct	+		+	+			+	+		
	J & F Security, Ltd.	British Companies in Sierra Leone	+									
United States	Booz Allen Hamilton	U.S., Africa, Asia, Australia, Europe, Latin America, Saudi Arabian Marine Corps, Saudi Arabian Armed Forces Staff College										
	AirScan Inc.	Chevron in Angola, Cano Limon pipeline in Colombia, U.S. Air Force, NATO – Bosnia, Kosovo, Macedonia					+		+	+	+	
	Kellogg, Brown and Root Inc.	U.S. Navy and Army,									+	
	Military Professional Resources Incorporated	U.S., Balkans, East Timor, Colombia, numerous African nations				+						
	U.S. Defense Systems Inc.	U.S., Africa, Middle East, Asis	+			+						
	Wackenhut Corporation	U.S. federal and state governments – 55 countries	+									
Zimbabwe	Avient (Pvt) Ltd.	Democratic Republic of the Congo			+	+					+	

*Services Provided:

1 – Bodyguard
2 – Arms Shipment
3 – Armed military Support
4 – Military training
5 – Natural resource security
6 – De-mining
7 – Military Intelligence
8 – Risk Management
9 – Logistics